TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1924

No. [redacted] 258

POWER MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

HARVEY SAUNDERS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED [illegible]

(31,974)

(31,574)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 851

POWER MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1926

[fol. 1] **IN SUPREME COURT OF ARKANSAS**

No. 8813

Power Manufacturing Company, Appellant,

vs.

Harvey Saunders, Appellee

Stipulation re Transcript of Record

It is stipulated and agreed by the parties hereto that the Clerk of the Supreme Court of Arkansas, in making the transcript of record for the writ of error in above case, shall include the following:

1. Complaint.
2. Summons.
3. Motion to dismiss.
4. Amendment to motion to dismiss.
5. Answer.
6. Order of Saline Circuit Court overruling motion to dismiss.
7. Judgment of Saline Circuit Court.
8. Opinion of Supreme Court of Arkansas.
9. Judgment of Supreme Court of Arkansas.
10. Petition for writ of error.
11. Assignment of errors.
12. Writ of error.
13. Citation.
14. Bond.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys for Appellant, Power Manufacturing Company.
William R. Donham, Attorneys for Appellee, Harvey Saunders.

[fol. 2] [Caption omitted]

[fol. 3] In Circuit Court of Saline County

Harvey Saunders, Plaintiff,

vs.

The Power Manufacturing Company, Defendant

Bill of Complaint—Filed August 2, 1923

The plaintiff, Harvey Saunders, for his cause of action against the defendant, Power Manufacturing Company, states:

That he is a resident and citizen of the City of Cincinnati, State of Ohio; that defendant is a corporation organized under the laws of the State of Ohio, with its principal place of business at Marion, Ohio, and is a corporate citizen and resident of said State of Ohio.

That on the 27th day of March, 1922, he was employed by the defendant at Stuttgart, Arkansas, and on said date was engaged with two employees in rolling a heavy wheel, weight about 4,000 pounds, and about six feet in diameter, on the floor of defendant's warehouse, for the purpose of removing it from said house, and loading it into a railroad car to be shipped to a party who had purchased it; that while so engaged he was severely injured.

That while employed as hereinabove alleged it was the duty of the defendant company to use reasonable care to furnish him a reasonably safe place in which to work, and it was the duty of the employees assisting him to exercise [fol. 4] reasonable care in the performance of their duties. That while he and said other employees were rolling said wheel along the floor of said defendant's warehouse it became overbalanced and fell; that when he saw that it was going to fall he attempted to get out of the way so that it would not fall upon him; that he would have succeeded in extricating himself from his dangerous situation except for the fact that the heel of his shoe caught between two of the floor planks and he was thus held while the rim of said wheel came down upon his right leg; breaking same about three inches above the ankle, resulting in a compound fracture of the bones of the leg; that his said leg was broken

just below the knee joint, the head of the large bone known as the tibia being broken off; that on the next day after his injury he was brought to a hospital in the City of Little Rock, where he remained for a period of nineteen weeks. His entire leg became infected and was lanced in eleven different places; that because of his injuries he was placed under the influence of an anesthetic on three different occasions for the purpose of setting the broken bones and in order that he might receive proper treatment for his injured limb; that his injuries are permanent and such as to render him a cripple, the joints of the limb at the knee and ankle being left in an ankylosed condition; that because of his injuries he was made to suffer great pain, both of body and mind and will continue to suffer as long as he shall live.

That his injuries were due to the joint negligence and [fol. 5] carelessness of the employees assisting him, in not taking proper care to prevent said wheel becoming overbalanced and falling, and the defendant company in failing to exercise reasonable care to provide him a reasonably safe place in which to work, in that the floor of said warehouse was so constructed, by reason of the space left between the floor planks, as to make it exceedingly dangerous.

That prior to his injuries he was receiving the sum of $175.00 per month as his wages; that because of his injuries he will never again be able to do so much work as he was accustomed to doing before his injuries; that because of his injuries he has been damaged in the sum of $35,000.

Wherefore, he prays judgment against the defendant in the sum of $35,000 damages, for costs and all other proper relief.

Mehaffy, Donham, & Mehaffy, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 6] Summons and sheriff's return, filed August 11, 1923, omitted in printing.

[fol. 7] IN CIRCUIT COURT OF SALINE COUNTY

[Title omitted]

MOTION TO DISMISS—Filed September 3, 1924

Comes the defendant and moves the Court to quash the service of summons and to dismiss the complaint filed herein, for want of jurisdiction and for cause says:

I

The plaintiff at the time of the accident complained of was a resident and citizen of Arkansas County, and still maintains a residence in said county, and all of the matters and things complained of in said complaint occurred in said county.

The defendant is a corporation organized and existing under the laws of the State of Ohio, and is doing business as a foreign corporation in Arkansas; that its business in Arkansas is located and conducted in Arkansas County, and it does not maintain or conduct an office or business in any other County in this State.

The plaintiff seeks to maintain this suit against the defendant in this county under and by virtue of the pretended authority of Section 1829, Crawford & Moses' Digest of the Statutes of Arkansas.

[fol. 8] That said section is null and void as applied to this defendant, for the following reasons:

The said section does not apply to corporations of this State and under the statutes and laws, corporations of this State cannot be sued except in Counties where their principal office is located or in which they do business. That this defendant has no office or place of business nearer to Saline County than Arkansas County, and if plaintiff is allowed to maintain this suit in this County, defendant will be denied a fair and impartial trial, because the defendant witnesses are not within jurisdiction of this Court and cannot be required to attend the trial and defendant will be deprived of the benefit of their presence at the trial, unless it be able to make arrangements for their attendance at court, at great and unnecessary expense.

That such attempt of said Section 1829, Crawford &

Moses' Digest to confer jurisdiction of this case upon this Court while such jurisdiction is not conferred in the cases of corporations of this State doing business in Arkansas and other counties of the State is a discrimination against the defendant, and in violation of that part of Article twelve, Section Eleven of the Constitution of Arkansas, which provides that foreign corporations as to contracts made or business done in this State shall be subject to the same regulations, limitations, and liabilities as like corporations in this State.

[fol. 9] II

That by said Article Twelve, Section Eleven of the Constitution of Arkansas, the State of Arkansas guaranteed to this defendant, when it entered the State of Arkansas for the purpose of doing business therein, that, as to contracts made, or business done in this State, it should be subject to the same regulations, limitations and liabilities as like corporations of this State. That relying upon said constitutional guarantee the defendant entered this State and made large investments for the purpose of carrying on its business, and that the attempted enforcement against this defendant of the provisions of Section 1829 of Crawford & Moses' Digest, while same are not enforced against like corporations of this State, is an impairment of the obligations of the contract created by the Constitution of Arkansas, and in violation of Section Ten, Article One, and Section One of the Fourteenth Amendment of the Constitution of the United States.

Wherefore defendant prays that the complaint herein be dismissed.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys for Defendant.

[fol. 10] *Duly sworn to by H. T. Harrison. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 11] In Circuit Court of Saline County

[Title omitted]

Amendment to Motion to Dismiss—Filed March 3, 1924

Comes the Power Manufacturing Company, and as an amendment to its motion to dismiss previously filed herein, reaffirms all the allegations and statements contained in said motion, and states further:

That the defendant is a foreign corporation, created by and existing under the laws of the State of Ohio; that it has been duly licensed to do business in the State of Arkansas, having fully complied with all the laws of the said State; that it designated in its application for said license and authority to do business in the State, its general office or place of business in the State of Arkansas, as Stuttgart, in the county of Arkansas, State of Arkansas, and named as its agent upon whom process may be served George C. Lewis, and designated his place of residence in Stuttgart, County of Arkansas, in the State of Arkansas; and that the cause of action sued on herein arose in said City of Stuttgart, County of Arkansas; that it does not keep or maintain in the County of Saline a branch office or other place of business; nor is there any property of or debts owing to it in the said County of Saline; nor is it engaged in the business of banking or insurance, nor does [fol. 12] its chief officer reside in said County of Saline.

That as shown by the summons it was directed to the sheriff of Arkansas County, State of Arkansas, and his return thereon shows that it was served by said Sheriff on the designated agent of the defendant in said County of Arkansas, and that no service was had on this defendant in the said county of Saline.

And this defendant claims and charges that Section 1829 of Crawford & Moses' Digest of Arkansas statutes, authorizing foreign corporations to be sued in any county in the State regardless of the county in which such foreign corporation may be served, while domestic corporations can only be sued in the county where their principal office is, is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, pro-

hibiting a State from depriving any person within the State or his or its property without due process of law or denying to any person within its jurisdiction the equal privilege of the laws.

Wherefore, defendant prays as in its original motion, that the service of process on it herein be quashed and set aside and that plaintiff's suit be dismissed.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys for Defendant.

[fol. 13] *Duly sworn to by H. T. Harrison. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 14] In Circuit Court of Saline County

[Title omitted]

Answer—Filed March 3, 1924

Comes the defendant, The Power Manufacturing Company, and, without waiving its motion to dismiss previously filed herein, but expressly reserving its objections and exceptions to the action of the Court in overruling said motion and in assuming jurisdiction of this cause, for its answer to plaintiff's complaint, states:

It does not know and therefore denies that plaintiff is a resident and citizen of Ohio.

It is true that the plaintiff was employed by the defendant at Stuttgart, Arkansas, the 27th day of March, 1922, and that on said date he was engaged, with two other persons, in loading an iron wheel from defendant's warehouse into a railroad car to be shipped to a person who had purchased it, but it does not know and therefore denies that the two persons who were engaged with the plaintiff at the time were employees of the defendant.

Defendant states that it does not know and therefore denies that while the plaintiff and any other employees of the defendant were rolling said wheel along the floor of the

defendant's warehouse it became overbalanced and fell, or that the plaintiff attempted to get out of the way of said [fol. 15] wheel, or denies that he was delayed in extricating himself from a dangerous situation by reason of the heel of his shoe getting caught between two of the floor planks, or that he was thus held while the rim of said wheel came down upon his right leg. Denies that the heel of his shoe caught between two of the floor planks.

Defendant denies that the plaintiff suffered a compound fracture to the bones of the leg, or that his leg was broken about three inches above the ankle or just below the knee joint, or that the head of the tibia was broken off. Denies that his leg became infected or that it was lanced in eleven different places, or that on account of his injuries he was placed under an anesthetic on three different occasions for purposes of treatment. Denies that plaintiff's injuries are permanent or such as to render him a cripple. Denies that the joints of the limb at the knee and the ankle are in ankylosed condition. Denies that he was made to suffer great pain of body and mind on account of his injuries or that he will continue to suffer in the future.

Defendant states that it is not true that the plaintiff's injuries were due to the joint negligence and carelessness of the persons assisting him in not taking proper care to prevent said wheel becoming overbalanced and falling and of the defendant failing to exercise due care to provide the plaintiff a reasonable safe place in which to work. Denies that the floor of the warehouse was so constructed as to make it dangerous or that space was left between the [fol. 16] floor planks that this condition was not such as to render the floor unsafe for the uses to which it was to be put. Defendant denies that the persons working with the plaintiff at the time of the injury complained of failing to exercise due care to prevent said wheel becoming overbalanced and falling but avers that said persons in the discharge of their duties exercised due care to prevent the accident and the floor, where the plaintiff was working at the time, was reasonably safe for the uses to which it was to be put.

Defendant further states that the plaintiff was in charge of the loading operations described in his complaint and the men who were assisting were working under his con-

trol and direction and the conditions of the place where he was working, were open and obvious and were well known to him, and whatever injuries he may have suffered at the time and palce complained of were due to his own negligence or to a risk assumed by him.

Defendant denies that because of the injuries complained of plaintiff's ability to work or his earning capacity has been diminished to any extent whatever, or that he has been damaged in the sum of $35,000.00, or any other amount.

For a further and complete defense to plaintiff's suit herein, the defendant states that on or about the 15th day of April, 1922, more than two weeks after the injuries complained of, the defendant, at the request of the plaintiff, effected an agreement of settlement with the plaintiff under the terms of which settlement the plaintiff, for a valu-[fol. 17] able consideration, paid by the defendant released and discharged the defendant of and from any and all claims and demands of every nature whatever growing out of the accident and injuries described in plaintiff's complaint, which settlement the defendant pleads as a bar to this suit.

Wherefore, having fully answered, defendants prays that plaintiff's suit be dismissed, and it be hence discharged with all its costs, and this be expended.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 18] In Circuit Court of Saline County

[Title omitted]

Order Setting Cause for Hearing—March 3, 1924

This cause coming on to be heard upon the complaint of the plaintiff and the summons and the Sheriff's return thereon and the defendant's motion to dismiss and amendment to said motion and a certified copy of the mandate of the United States District Court for the Eastern District of Arkansas, Western Division, remanding this cause to

the State court for trial, and the Court being well and sufficiently advised in the premises, doth overrule the defendant's motion to dismiss and the amendment to the motion to dismiss to which action of the Court the defendant at the time duly excepted and had its exceptions noted of record.

Therefore, the defendant within the time allowed by the Court filed its answer in this cause, and by order of the Court this cause is set specially for trial on Monday, March 17th, 1924.

[fol. 19] In Circuit Court of Saline County

[Title omitted]

Judgment—March 17, 1924

On this day this cause coming on to be heard and comes the plaintiff, Harvey Saunders in person and by his Attorneys, Mehaffy, Donham & Mehaffy, Esqrs., and comes also the defendant, The Power Manufacturing Company, by its Attorneys, H. T. Harrison, Esqr., and Ernest Briner, Esqr., and both parties announce ready for trial.

Whereupon a jury is ordered and comes all the members of the regular panel of the Petit Jury who were duly sworn and tried as to their qualifications and found competent and the following named jurors were selected and duly sworn to try this case, to-wit: J. B. Suddeth, T. R. Warnock, W. A. Beckwith, J. L. Smith, Lee Cate, Roscoe Young, J. D. Little, J. W. Northern, B. A. Gregory, A. L. Stirman, W. A. Russell and Wm. Richey, who were accepted by both parties and were duly sworn and empaneled as a trial jury in this case and after hearing the evidence adduced, the argument of counsel, and receiving the instructions of the Court retired to consider of their verdict and afterwards on the same day returned into open court the following verdict, to-wit: "We the jury find for the plaintiff in the sum of $7,500.00. J. B. Suddeth, Foreman."

[fols. 20 & 21] It is therefore considered, ordered and adjudged by the Court that the plaintiff do have and recover of and from the defendant, The Power Manufacturing Company, judgment in the sum of Seven Thousand

and Five Hundred and no/100 ($7,500.00) Dollars and all costs accrued in this case for which execution may issue.

[fol. 22] IN SUPREME COURT OF ARKANSAS

[Caption omitted]

[Title omitted]

JUDGMENT—November 2, 1925

This cause came on to be heard upon the transcript of the record of the circuit court of Saline county, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs, and that said appellee recover of said appellant and Fidelity and Deposit Company of Maryland, surety in the supersedeas bond filed in this cause, the sum Seven Thousand and Five Hundred Dollars, with interest at six per cent per annum from the 17th day of March, A. D. 1924, the amount of judgment of said circuit court.

It is further considered that said appellee recover of said appellant and said surety all his costs in this Court and the court below in this cause expended, and have execution thereof.

[fol. 23] IN SUPREME COURT OF ARKANSAS

[Title omitted]

OPINION—November 2, 1925

SMITH, J.:

Appellee, who was the plaintiff below, was, at the time of the institution of this suit, a resident and citizen of Cincinnati, Ohio, and appellant, the defendant below, is a corporation organized under the laws of that state and having its principal place of business in Marion, Ohio.

Appellant has been duly authorized to do business in this State, and operates, at Stuttgart, in Arkansas county, Arkansas, a warehouse, from which it delivers machinery to the purchasers thereof. On March 27th, 1922, plaintiff was employed by the defendant at its warehouse in Stuttgart, in conjunction with two other employees of defendant, in rolling a heavy fly-wheel, weighing about four thousand pounds and about six feet in diameter, on the floor of the warehouse for the purpose of loading the wheel into a railroad car, to be shipped to a party who had purchased the wheel, and while so engaged the wheel became overbalanced and fell on plaintiff and inflicted a very serious injury. This suit was brought to recover damages to compensate this injury.

Defendant moved the court to quash the service of summons and to dismiss the complaint for the want of jurisdiction for the reason that the plaintiff, at the time of the {fol. 24} accident, was a resident and citizen of Arkansas county, where the injury occurred, and where the defendant conducted its business in this State. Defendant did not maintain an office or conduct business in any other county in this State. The suit was brought in Saline county, Arkansas, and it was alleged, in the motion to dismiss, that neither of the parties to this suit, nor any of the witnesses in the case, resided in Saline county, and that it would involve the expenditure of a large sum of money for the defendant to arrange for the attendance of its witnesses in that county. It was, therefore, alleged, in the motion to dismiss, that it would be a discrimination against the defendant to require it to defend the suit in Saline county, and that Section 1829 C. & M. Digest of the statutes of the State, which permitted the suit to be brought in any county in the State, violated that part of Article 12, Section 11, of the Constitution of the State, which provides that foreign corporations shall be subject, as to contracts made or business done in this State, to the same regulations, limitations, and liabilities as like corporations of this State, and that said section of the statutes of the State impaired the obligation of the contract created by the Constitution of the state and is, therefore, void under Section 10, Article 1, of the Federal Constitution, and it was further insisted that the statute is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United

States, prohibiting a State from depriving any person within the State of his or its property without due process [fol. 25] of law, or denying to any person within its jurisdiction the equal protection of the law.

The motion to quash the summons and to dismiss the action for want of jurisdiction was overruled, and this ruling of the court is assigned as error.

Appellant concedes that the motion to dismiss was properly overruled if Section 1829 C. & M. Digest is valid and constitutional, but, as was set forth in the motion, the constitutionality of that statute is challenged as violative of both the State and Federal Constitutions. The section of the statute in question reads as follows: "Sec. 1829. Service of summons and other process upon the agent designated under the provisions of Section 1826 at any place in this State shall be sufficient service to give jurisdiction over such foreign corporation of any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending or not."

The question presented is an interesting one, but was decided adversely to appellant's contention in the case of Pekin Cooperage Co. v. Duty, 140 Ark. 135. The points here raised were there presented, and we there said that the statute provided a method of procedure whereby foreign corporations which had complied with the law of the State authorizing them to do business in the State might be sued, and that a local or county residence had not been given such corporations, and that the statute did not impair any constitutional rights of foreign corporations or discriminate [fol. 26] against them, but had only provided the forum in which they might be sued, as they had been given no local residence in the State.

It is earnestly insisted, however, that this case should be reconsidered and overruled, in view of the decision of the Supreme Court of the United States in the case of Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U. S. 544.

In that case there was involved the validity of a statute of the State of Wisconsin, which provided that a foreign corporation not domesticated or doing business in that State or having property there other than that sought to be recovered in the particular action, may be compelled, as a condition to the maintenance of its action, to send an officer

of the corporation, with its books and papers bearing on the matter in controversy, from its domicile to the State of Wisconsin, where the action was brought, in order to submit to an adversary examination before the party sued should be required to answer. The statute did not subject non-resident individuals to such examination except when served with notice within the State, and then only in the county where service was had, and limited the examination, in the case of residents of the State, individual or corporate, to the county of their residence.

The statute was upheld by the Supreme Court of Wisconsin (171 Wis. 586) on the ground that it amounted to no more than a reasonable exercise of the authority of the [fol. 27] State over a nonresident corporation coming voluntarily into the State to seek a remedy in the courts of that State against a resident defendant.

The case was appealed to the Supreme Court of the United States, where the view of the Supreme Court of the State of Wisconsin was disapproved, and Mr. Justice Van Devanter, speaking for the Supreme Court of the United States, said the statute violated the equal protection clause of the Federal Constitution by imposing a rule more onerous on foreign corporations than was applicable to nonresident individuals in like situation, and was also more onerous than that applicable to resident suitors, whether individuals or corporations.

Our statute, under our interpretation of it in the cases herein cited, is not one imposing burdens as a condition precedent upon which foreign corporations may have access to the courts of the State, but is one procedure, prescribing the venue where actions may be brought against foreign corporations by anyone, resident or nonresident.

We adhere, therefore, to your former interpretation of the statute and approve the action of the trial court in overruling the motion to dismiss. American Hardwood Lbr. Co. v. Ellis & Co. 115 Ark. 524; Pekin Cooperage Co. v. Duty, supra; Missouri State Life Ins. Co. v. Witt, 165 Ark. 604.

It is next insisted that the court erred in submitting to the jury the question of the defective condition of the floor of the warehouse on which the wheel was being rolled as [fol. 28] concomstituting actionable negligence. The testi-

mony shows that the floor of the platform was constructed of two-inch planks, laid with open cracks, and that as the wheel was being loaded into a car it became overbalanced and started to fall, and as plaintiff attempted to get out of the way the heel of his shoe caught in one of the cracks, which was about three inches wide, and while he was thus entrapped the wheel fell over on him.

It is insisted that the alleged defect was structural in its nature, and that the plaintiff had been employed by defendant for about eleven months and should have been charged, as a matter of law, with the assumption of the risk of an injury from a danger so obvious. It is true that plaintiff had been employed by the defendant for about eleven months, but it is also true that he had been employed as a field man or "trouble schooter" in the rice fields, where the machinery sold by defendant was installed, and it was the business of plaintiff to install the machinery and to report and remedy any defects which developed in the machinery so installed, and plaintiff testified that he had never before assisted in loading a wheel or other machinery from the warehouse into a car.

We are unwilling to say, as a matter of law, that plaintiff assumed the risk of injury from the defective condition of the platform. Moreover, the defendant requested instructions submitting this issue to the jury, and it cannot, therefore, complain that this was done.

The case was submitted to the jury also on the question [fol. 29] of the negligence of appellee's fellow-servants. The instructions on this issue are not questioned as correct declarations of law, but it is insisted that the testimony did not warrant the submission of the issue to the jury. The testimony of appellee touching the cause of his injury was to the following effect. He and two other employees had loaded the base of the engine and the boxed parts thereof into a car, and were proceeding to load the fly-wheel. In rolling the fly-wheel from the platform, which joins the warehouse, they had it on a plank laid crosswise on the floor, and the plank rested on the top of the car floor, and in order to get down to the level of the car floor, so as not to have a drop, plaintiff laid another plank by the side of the one extending into the car. They had turned the wheel crosswise to roll it on to the second plank. Plaintiff was on the side next to the warehouse,

and the other two men were on the opposite side of the wheel, and in rolling it these two men pushed the wheel beyond the balancing point, and when they did so they released their hold on the wheel and yelled to plaintiff to get out of the way. Plaintiff attempted to hold the wheel until he could get out of the way, and while endeavoring so to do so his heel caught in one of the cracks in the floor of the platform. Plaintiff alone could not restore the wheel to a balance and it fell over on his leg and crushed it.

The case is not unlike the recent case of Texas Pipe Line Co. v. Johnson, Ms. Op., and is controlled by the principles [fol. 30] there announced. In that case an employee, in conjunction with four other employees, was engaged in laying a pipe line for running oil into a main pipe line. The pipe was being carried with carrying-irons, and one of the employees released his hold on the carrying-iron, thus throwing, unexpectedly, the weight of the pipe on the plaintiff in that case. We said the jury was warranted in finding that this action of the fellow-servant was negligence. So, here, we think the jury was warranted in finding that the action of plaintiff's fellow-servants in so pushing on the wheel as to overturn it was negligence.

It is finally insisted that the jury should have been instructed to return a verdict for the defendant upon the ground that, for a valuable consideration, plaintiff had released defendant from further liability. Appellee responds to this insistence by saying, first, that the release should be so construed as applying only to certain specific items of damage therein referred to. Appellee further insists that the testimony warranted the jury in finding that at the time the release was signed he was incapacitated to contract because of his suffering from his injury. This question was submitted to the jury under correct instructions, and the finding of the jury is conclusive of this issue of fact. We do not, therefore, review the language of the release itself.

Appellee testified that he had discussed with appellant's adjuster only the payment of hospital bills and doctor's fees and certain other items. That while he glanced over [fol. 31] the release before signing it he did not understand that it attempted to release his claim for damages. That he had not slept for nineteen days except a few minutes

at a time, and then only when under the influence of an opiate, and at the time he signed the writing there were eleven drainage tubes in his leg and he had a temperature running as high as 103.

Under those circumstances it was a question for the jury to determine whether plaintiff had the capacity to make a binding contract of release. St. L. I. M. & S. Ry. Co. v. Brown, 73 Ark. 42; Bearden v. St. L. I. M. & S. Ry. Co. 103 Ark. 341; St. L. I. M. & S. Ry. Co. v. Reilly, 110 Ark. 182; Harris Lbr. Co. v. Morris, 80 Ark. 260; Truman Cooperage Co. v. Crye, 137 Ark. 293; St. L. I. M. & S. Ry. Co. v. Sandidge, 81 Ark. 264; Poinsett Lbr. & Mfg. Co. v. Longino, 139 Ark. 69.

What we have said disposes of appellant's contention that a verdict should have been directed in its favor under the undisputed evidence.

It is not insisted that the verdict is excessive, and as we find no prejudicial error in the judgment it is affirmed.

[fol. 32] Clerk's certificate to foregoing papers omitted in printing.

[fol. 33] In Supreme Court of Arkansas

[Title omitted]

Assignment of Errors—Filed December 11, 1925

Now comes appellant, Power Manufacturing Company, and files herewith its petition for a writ of error, and says there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

1. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 10, Article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

2. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within [fol. 34] its jurisdiction the equal protection of the laws."

3. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property, without due process of law."

4. The Supreme Court of Arkansas erred in affirming the action of the trial Court in rendering a judgment against the appellant, Power Manufacturing Company.

For which errors the appellant, Power Manufacturing Company, prays that the judgment of the Supreme Court of the State of Arkansas, dated November 2nd, 1925, be reversed, and a judgment rendered in favor of the Appellant Company, and for costs.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys for Appellant, Power Manufacturing Company.

[File endorsement omitted.]

[fol. 35] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed December 11, 1925

Considering itself aggrieved by the final decision of the Supreme Court of Arkansas in rendering judgment against it in the above entitled case, the appellant hereby prays a

writ of error from said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond

Assignment of errors herewith.

Geo. C. Lewis, Buzbee, Pugh & Harrison, Attorneys for Appellant, Power Manufacturing Company.

STATE OF ARKANSAS, ss:

SUPREME COURT

Let the writ of error issue upon the execution of a bond by Power Manufacturing Company to Harvey Saunders, in the sum of Ten thousand Dollars ($10,000.00), such bond when approved to act as a supersedeas.

Dated December 11, 1925.

E. A. McCulloch, Chief Justice Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 36] Bond on writ of error for $10,000, approved and filed December 11, 1925, omitted in printing.

[fol. 37] IN SUPREME COURT OF ARKANSAS

WRIT OF ERROR—Filed December 11, 1925

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Harvey Saunders and Power Manufacturing Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the de-

cision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Power Manufacturing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the [fol. 38] laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 11th day of Dec., in the year of our Lord one thousand nine hundred twenty-five.

Sid B. Redding, Clerk District Court of the United States, Western Division, Eastern District of Arkansas, by H. P. Feild, D. C. (Seal of the District Court, Western Division, U. S. A.)

Allowed. E. A. McCulloch, Chief Justice Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 39] Certificate of lodgment omitted in printing.

[fol. 40] Citation in usual form, showing service on William R. Donham, filed December 11, 1925, omitted in printing.

[fol. 41] Return to writ of error omitted in printing.

[fol. 42] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed December 19, 1925

Comes the appellant and plaintiff in error and states that the points on which it intends to rely in the consideration of the above cause are, as follows:

1. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 10, Article 1 of the Constitution of the United States, which provides that, no State shall pass any law impairing the obligation of contracts.

2. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

3. The Supreme Court of Arkansas erred in holding and deciding that Section 1829 of Crawford and Moses' Digest of the Statutes of Arkansas was valid. The validity of said Section was denied and drawn in question by the appellant, [fol. 43] Power Manufacturing Company, on the ground of its being repugnant to that part of Section 1 of the 14th

Amendment to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property, without due process of law."

4. The Supreme Court of Arkansas erred in affirming the action of the trial Court in rendering a judgment against the appellant, Power Manufacturing Company.

That it is necessary for the consideration thereof that the entire record be printed.

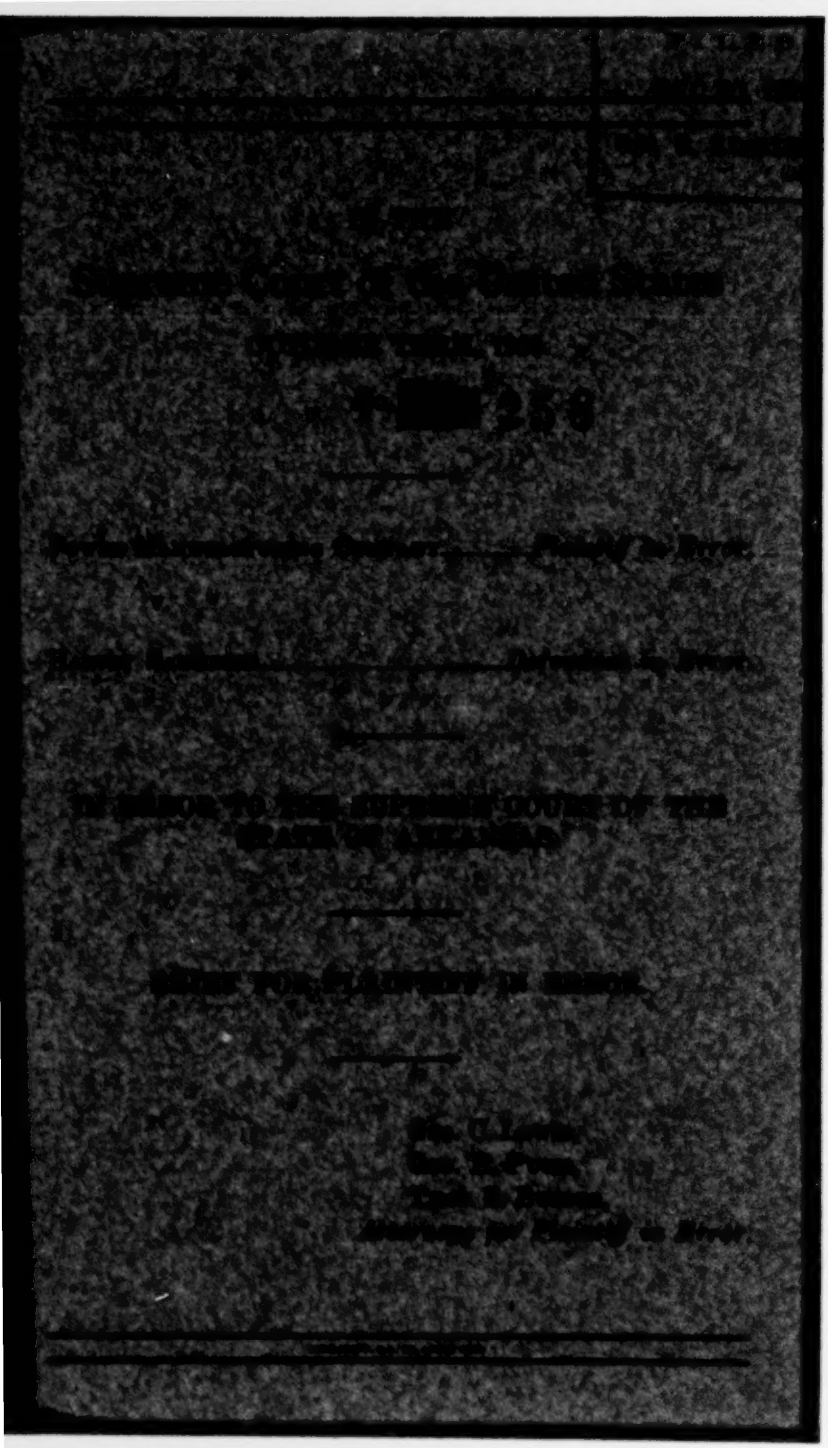
Thos. S. Buzbee, Geo. B. Pugh, H. T. Harrison, Geo. C. Lewis, Attorneys for Appellant and Plaintiff in Error.

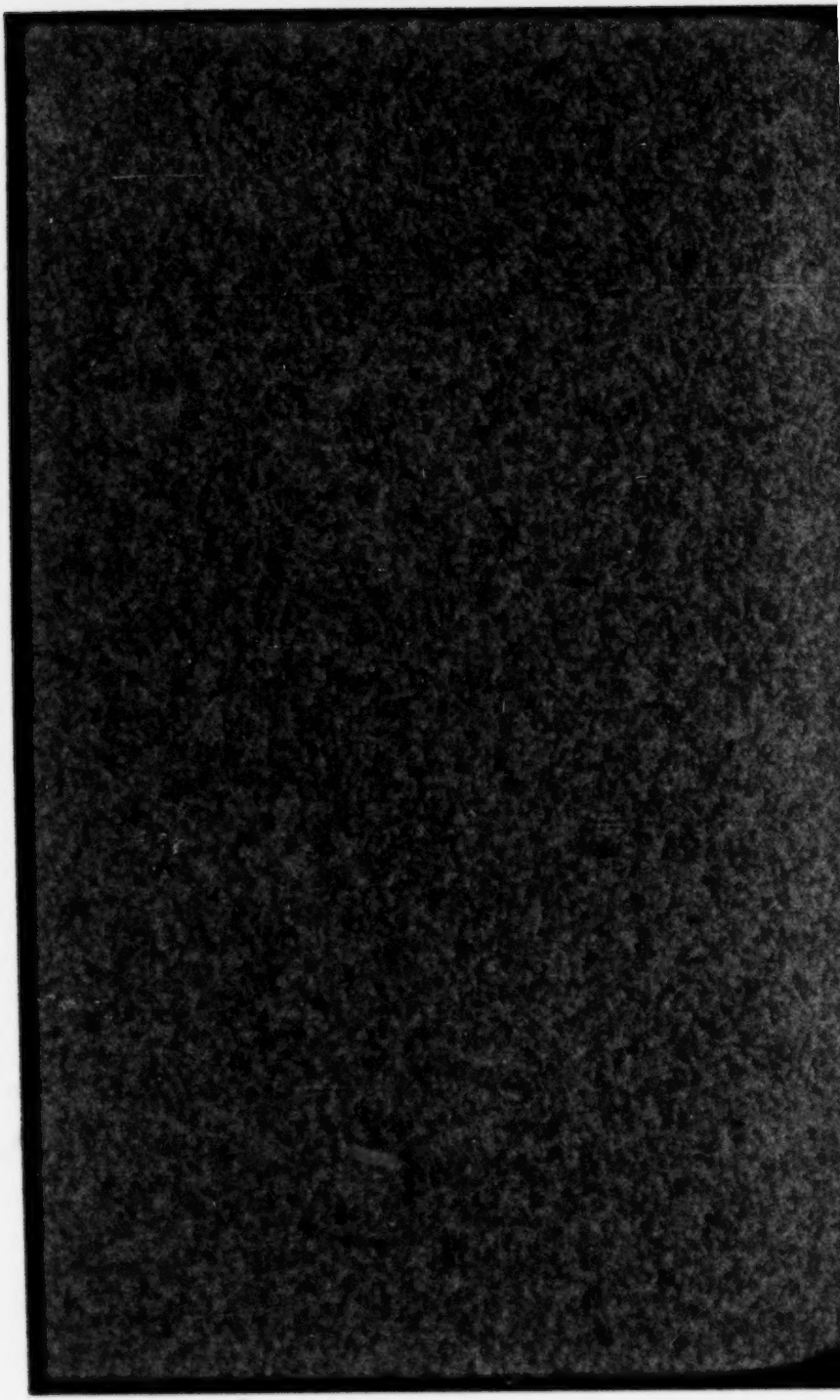
It is agreed by the parties hereto that the entire record in this case is necessary for the consideration of the points involved.

Thos. S. Buzbee, Geo. B. Pugh, H. T. Harrison, Geo. C. Lewis, Attorneys for Appellant and Plaintiff in Error. William R. Donham, Attorney for Appellee and Defendant in Error.

[fol. 44] [File endorsement omitted.]

Endorsed on cover: File No. 31,574. Arkansas Supreme Court. Term No. 851. Power Manufacturing Company, plaintiff in error, vs. Harvey Saunders. Filed December 19th, 1925. File No. 31,574.





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TABLES OF CASES CITED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 851

POWER MANUFACTURING COMPANY ..... *Plaintiff in Error,*

v.

HARVEY SAUNDERS ..... *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

JURISDICTION.

This writ of error was sued out to reverse a judgment of the Supreme Court of Arkansas, rendered November 2, 1925, (Tr. p. 11) and reported 169 Ark. 748. Plaintiff in error contended that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas, involved in said suit, was void because repugnant to that part of section 10, article 1, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and that part of section 1 of the Fourteenth Amendment to the Constitution which provides that no State shall "deny to any person within its jurisdiction the

equal protection of the laws" nor "deprive any person of life, liberty or property without due process of law." The Supreme Court of Arkansas sustained the validity of said statute, and a writ of error to this court was obtained under the provisions of section 237 (a) of the Judicial Code.

STATEMENT.

Section 1829, Crawford & Moses' Digest of the Statutes of Arkansas, as construed by the Supreme Court of Arkansas, authorizes foreign corporations to be sued in any county in the State, regardless of the location of principal office or place of business of the corporation.

The venue of suits against corporations organized under the laws of Arkansas is limited by sections 1152 and 1171 of Crawford & Moses' Digest, to counties in which the corporations have an officer or place of business or in which their chief officer resides.

The venue of suits (transitory actions) against individuals is limited by Section 1176, Crawford & Moses' Digest, to the county in which the defendant, or one of several defendants, resides, or is summoned.

These sections, together with other sections of the Constitution and statutes of Arkansas pertinent to a consideration of the case, will be found in an appendix to this brief.

The plaintiff in error, Power Manufacturing Company, is a corporation organized under the laws of the State of Ohio and authorized to do business in the State of Arkansas. The defendant in error, plaintiff below, filed suit against the plaintiff in error, defendant below, in the Circuit Court of Saline County, Arkansas, to recover damages for personal injuries alleged to have been received while he was in the employ of plaintiff in error at Stuttgart, Arkansas (Tr. p. 2). Plaintiff in error, defendant below, filed a motion to dismiss said suit, the material part of which is as follows:

"I.

"The plaintiff at the time of the accident complained of was a resident and citizen of Arkansas County, and still maintains a residence in said county, and all of the matters and things complained of in said complaint occurred in said county.

"The defendant is a corporation organized and existing under the laws of the State of Ohio, and is doing business as a foreign corporation in Arkansas; that its business in Arkansas is located and conducted in Arkansas County, and it does not maintain or conduct an office or business in any other county in this State.

"The plaintiff seeks to maintain this suit against the defendant in this county under and by virtue of the pretended authority of section 1829, Crawford & Moses' Digest of the Statutes of Arkansas.

"That said section is null and void as applied to this defendant, for the following reasons:

"The said section does not apply to corporations of this State, and, under the statutes and laws, corporations of this State cannot be sued except in counties where their principal office is located or in which they do business. That this defendant has no office or place of business nearer to Saline County than Arkansas County, and if plaintiff is allowed to maintain this suit in this county, defendant will be denied a fair and impartial trial, because the defendant witnesses are not within jurisdiction of this court and cannot be required to attend the trial, and defendant will be deprived of the benefit of their presence at the trial, unless it be able to make arrangements for their attendance at court, at great and unnecessary expense.

"That such attempt of said section 1829, Crawford & Moses' Digest, to confer jurisdiction of this case upon this court while such jurisdiction is not conferred in the cases

of corporations of this State doing business in Arkansas and other counties of the State, is a discrimination against the defendant, and in violation of that part of article twelve, section eleven of the Constitution of Arkansas, which provides that foreign corporations as to contracts made or business done in this State shall be subject to the same regulations, limitations, and liabilities as like corporations in this State.

II.

"That by said article twelve, section eleven of the Constitution of Arkansas, the State of Arkansas guaranteed to this defendant, when it entered the State of Arkansas for the purpose of doing business therein, that, as to contracts made, or business done in this State, it should be subject to the same regulations, limitations and liabilities as like corporations of this State. That, relying upon said constitutional guarantee, the defendant entered this State and made large investments for the purpose of carrying on its business, and that attempted enforcement against this defendant of the provisions of section 1829 of Crawford & Moses' Digest, while same are not enforced against like corporations of this State, is an impairment of the obligations of the contract created by the Constitution of Arkansas, and in violation of section ten, article one, and section one of the Fourteenth Amendment of the Constitution of the United States" (Tr. p. 4).

Also an amendment to said motion to dismiss, the material part of which is as follows:

"That the defendant is a foreign corporation, created by and existing under the laws of the State of Ohio; that it has been duly licensed to do business in the State of Arkansas, having fully complied with all the laws of the said State; that it designated in its application for said license and authority to do business in the State, its general office or place of business in the State of Arkansas as

Stuttgart, in the county of Arkansas, State of Arkansas, and named as its agent upon whom process may be served George C. Lewis, and designated his place of residence in Stuttgart, county of Arkansas, in the State of Arkansas; and that the cause of action sued on herein arose in said city of Stuttgart, county of Arkansas; that it does not keep or maintain in the county of Saline a branch office or other place of business; nor is there any property of or debts owing to it in the said county of Saline; nor is it engaged in the business of banking or insurance, nor does its chief officer reside in said county of Saline.

"That, as shown by the summons, it was directed to the sheriff of Arkansas County, State of Arkansas, and his return thereon shows that it was served by said sheriff on the designated agent of the defendant in said county of Arkansas, and that no service was had on this defendant in the said county of Saline.

"And this defendant claims and charges that section 1829 of Crawford & Moses' Digest of Arkansas statutes, authorizing foreign corporations to be sued in any county in the State regardless of the county in which such foreign corporation may be served, while domestic corporations can only be sued in the county where their principal office is, is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting a State from depriving any person within the State of his or its property without due process of law, or denying to any person within its jurisdiction the equal *privilege* of the laws" (Tr. p. 6).

The court overruled the motion to dismiss and the amendment to motion to dismiss, and the trial of the case resulted in a verdict and judgment for defendant in error, plaintiff below. On appeal to the Supreme Court of Arkansas the judgment was affirmed. *Power Manufacturing Company* v. *Saunders*, 169 Ark. 748.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Arkansas erred in holding and deciding that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas was valid. The validity of said section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of section 10, article 1, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

2. The Supreme Court of Arkansas erred in holding and deciding that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas was valid. The validity of said section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

3. The Supreme Court of Arkansas erred in holding and deciding that section 1829 of Crawford & Moses' Digest of the Statutes of Arkansas was valid. The validity of said section was denied and drawn in question by the appellant, Power Manufacturing Company, on the ground of its being repugnant to that part of section 1 of the 14th Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty or property, without due process of law."

4. The Supreme Court of Arkansas erred in affirming the action of the trial court in rendering a judgment against the appellant, Power Manufacturing Company.

ARGUMENT.

THE ARKANSAS STATUTE IS REPUGNANT TO THAT PART OF SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES WHICH PROVIDES THAT NO STATE SHALL PASS ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS.

The plaintiff in error, Power Manufacturing Company, entered the State of Arkansas under the provisions of article XII, section II, of the Constitution of Arkansas, which provides, as to foreign corporations, that "as to contracts made or business done in this State they shall be subject to the same regulations, limitations and liabilities as like corporations of this State." Notwithstanding this provision of the Constitution, section 1171 and 1152, Crawford & Moses' Digest, provide that actions against a corporation created by the laws of the State must be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides, or in which it has a branch office or place of business, while section 1829, Crawford & Moses' Digest, as construed by the Supreme Court of Arkansas, provides that, as to foreign corporations, suit may be brought in any county of the State, "whether the service was had upon said agent within the county where the suit is brought or is pending or not."

This provision enabled plaintiff in this case (defendant in error) to sue the defendant (plaintiff in error) for a personal injury in Saline County, Arkansas, although the only office or place of business which the defendant had in the State of Arkansas was in Arkansas County, where the accident of which plaintiff complains occurred, and although it had no office or place of business in Saline County. If the defendant had been organized under the laws of

Arkansas the suit would necessarily have been brought in Arkansas County. As a result of these statutes, a corporation organized under the laws of Arkansas and having its place of business in one county is subject to suit in a transitory action in that county only, while a corporation organized under the laws of another State, but authorized to do business in Arkansas under the provisions of the Constitution, and having an office or place of business in but one county, is subject to suit in seventy-five counties.

The discrimination and injustice imposed by the statute is glaringly illustrated in the present case. Plaintiff in error, defendant below, was engaged in the business of selling portable gasoline engines for use in rice fields. Its office and warehouse and the only place of business it had in the State of Arkansas were located at Stuttgart, in Arkansas County. Plaintiff had been in its employ at Stuttgart a number of years.

Plaintiff claimed to have been injured while engaged in loading a piece of machinery from the warehouse into a car. If he had received such an injury while employed by an individual or a domestic corporation in Arkansas County, he would have been required to bring suit in that county, where all of the parties lived, in a court which had jurisdiction of the witnesses and where the case could have been conveniently tried. But, because the defendant was a corporation organized under the laws of another State, plaintiff was allowed to pick any one of seventy-five counties, and did select a county remote from the scene of the alleged accident, where the court did not have jurisdiction of the witnesses and where, for some reason, possibly the influence of his friends or his counsel or political conditions, plaintiff thought his chances for obtaining a large verdict were better than they were in Arkansas County.

Section 4161, Crawford & Moses' Digest, provides that a witness shall not be obliged to attend the trial of a civil

action, except in the county of his residence or an adjoining county. Therefore, the defendant, plaintiff in error here, was required to go to trial without the presence of witnesses, except such as agreed voluntarily to attend. If the suit had been brought in Arkansas County, as would have been required if the defendant had been a domestic corporation, the attendance of witnesses could have been required by subpoena.

It is our contention that section 1829 of the Digest as enforced in this manner imposes different regulations and greater limitations and liabilities upon corporations organized under the laws of other States than are imposed upon corporations organized under the laws of Arkansas.

In the case of *American Smelting Company* v. *Colorado*, 204 U. S. 103, this court, in passing upon a statute of Colorado which contained provisions similar to those of the Constitution of Arkansas, said (p. 113):

> "A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming in the State should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. In other words, the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the

> corporation thus admitted to do business in the State. It was not a mere license to come in the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, corporation at the same time and to the same extent."

The Supreme Court of Arkansas in the case of *Pekin Cooperage Company* v. *Duty*, 140 Ark. 135, brushed aside the doctrine of the above case, on the theory that the case was a tax case, and that (quoting from the opinion, p. 138) "every State, however, has complete control over the remedies which it provides its suitors." We submit that this is not an answer to the proposition. The regulations, limitations and liabilities referred to by the Constitution of Arkansas are not limited to matters of taxation, but are certainly broad enough to cover all matters of substantive right, and the inhibition of the Federal Constitution against the impairment of contracts covers contracts of every character, and is not limited to contracts in matters of taxation.

In the case of *Edwards* v. *Kearzey*, 96 U. S. 595, this court, after a full discussion of the subject, announced the following rule, p. 607:

> "The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void."

In the case of *Louisiana* v. *New Orleans*, 102 U. S. 203, the court said, p. 206:

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

The latter opinion was quoted and approved in the case of *Hendrickson* v. *Apperson*, 245 U. S. 105-113.

We think it the height of absurdity to say that the liability to suit in seventy-five counties of a State is not different from and greater than the liability to suit in one county of a State. That the liability is considered of great importance by the litigants, both plaintiffs and defendants, is demonstrated by the fact that the question has been presented to the Supreme Court of Arkansas in a number of cases in comparatively recent years, to-wit: *American Hardwood Lumber Company* v. *Ellis*, 115 Ark. 524; *Pekin Cooperage Company* v. *Daty*, 140 Ark. 135; *Missouri State Life Insurance Company* v. *Witt*, 165 Ark. 604; *Jacks* v. *Central Coal & Coke Co.*, 156 Ark. 211; and the case now under consideration.

That such a constitutional provision applies to regulations as to the forum in which suits can be instituted or maintained has been decided by a number of courts.

In the case of *Seaboard Air Line Railway Company* v. *Railroad Commission of Alabama*, 155 Fed. 792, the Circuit Court of Alabama applied a similar provision to a statute prohibiting a foreign corporation from bringing a suit in the Federal court.

In the case of *C. R. I. & P. Ry. Co.* v. *Ludwig*, 156 Fed. 152, the district judge applied the identical provisions to

a statute of Arkansas prohibiting foreign corporations from instituting suits in or removing suits to the Federal court.

In the case of *C. R. I. & P. Ry. Co.* v. *Swanger*, 157 Fed. 783, the district judge applied similar provisions to a statute of Missouri prohibiting foreign corporations from removing suits to the Federal court.

In the case of *St. Louis & S. F. Railroad Company* v. *Cross*, 171 Fed. 480, the district court held to the same effect as to a statute of Oklahoma.

It is worthy of note that all of the district judges before whom the cases were brought held that the statutes violated the contract clause of the Constitution. If this is true where the regulation is of the right to remove to the Federal court, it must be equally true where the regulation subjects a foreign corporation to suits in seventy-five counties as against one county in the case of a domestic corporation.

These anti-removal statutes were subsequently held void by this court on the ground that a State "may not, in imposing conditions upon the privilege of a foreign corporation doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts." *Terral* v. *Burke Construction Company*, 257 U. S. 529, and cases therein cited.

When the doctrine as announced by this court in *Ex Parte Wisner*, 203 U. S. 449, to the effect that a suit could not be removed to the Federal court on the ground of diverse citizenship unless brought in the district of the residence of either the plaintiff or defendant, was still in force, plaintiffs, in suits against foreign corporations in Arkansas, by taking advantage of section 1829 of the Digest, could bring suits in a district other than that of their residence and prevent the removal of the case by the defendant to the Federal

court. This was done in the case of *Central Coal & Coke Company* v. *Orwig*, 150 Ark. 635.

A similar situation existed in the case of *Central Coal & Coke Co.* v. *Ocepek*, 244 S. W. 337. The case came to this court by certiorari and was reversed—261 U. S. 605—upon the authority of *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, and other cases overruling the Wisner case. These cases illustrate the importance attached by plaintiffs in suits against foreign corporations to the regulations, limitations and liabilities imposed by the statute under consideration.

It will probably be contended that plaintiff in error, in entering the State of Arkansas, accepted the construction placed upon the Arkansas statutes by the courts of that State. This is true. But the controlling law of the State is not the statutes but the Constitution. Plaintiff in error claims that the terms of that Constitution became a part of the contract between it and the State, and that the State is now attempting to violate the contract.

The Supreme Court of Arkansas practically admits that if the regulations, limitations and liabilities imposed upon foreign corporations are different from those imposed upon domestic corporations, that would be a violation of the Arkansas Constitution and an impairment of the obligations of the contract, but disposes of the matter by saying, in effect, that the regulations, limitations and liabilities are not different. This raises a question under the Federal Constitution, and when such a question is raised this court will consider the facts to determine if there is a violation of the Constitution, and the decision of the State court on that point is not binding.

Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S. 683.

Kansas City Southern v. *Albers Commission Co.*, 223 U. S. 573.

THE ARKANSAS STATUTE DENIES TO PLAINTIFF IN ERROR AND OTHERS IN LIKE SITUATION THE EQUAL PROTECTION OF THE LAWS.

In the first paragraph we have shown the discrimination created by the statute as between corporations organized under the laws of Arkansas and those organized under the laws of other States but doing business in Arkansas. For the purpose of this paragraph we call attention to the fact that the same discrimination also exists as between foreign corporations and individuals.

Section 1176, Crawford & Moses' Digest, provides that every other action (in effect, all transitory actions) must be brought in a county in which the defendant, or one of several defendants, resides or is summoned. Therefore, domestic corporations and individuals are on an equal footing and must be sued in the county of their residence or location, or where summoned, while foreign corporations may be sued in seventy-five counties, regardless of location or place of business.

It is no longer open to question that the equal protection clause of the Fourteenth Amendment applies to corporations as well as to persons. In the case of *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, the court said (p. 154):

> "It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway* v. *Herrick*, 127 U. S. 210; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Charlotte & Columbia Railroad* v. *Gibbes*, 142 U. S. 386; *Covington & Lexington Turnpike*

Company v. *Sanford*, 164 U. S. 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

The question to be considered, therefore, is whether the statute in question is merely a justifiable classification or is a denial of equal protection. On this point the court in the above case laid down the following general principle (p. 155).

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, *Hayes* v. *Missouri*, 120 U. S. 68; *Railroad Company* v. *Mackey*, 127 U. S. 205; *Walston* v. *Nevin*, 128 U. S. 578; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Giozza* v. *Tiernan*, 148 U. S. 657; *Columbia Southern Railway* v. *Wright*, 151 U. S. 470; *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380; *St. Louis & San Francisco Railway* v. *Mathews*, 165 U. S. 1; yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subject to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis

> for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Although a number of cases involving the statute have been presented to the Supreme Court of Arkansas and the constitutionality of the statute attacked, the court has not seen fit to give any reason for sustaining the statute as against the equal protection clause of the Constitution, the court having contended itself with holding that the harshness or inconvenience of the statute is a matter addressing itself to the lawmakers (*American Hardwood Company* v. *Ellis & Company*, 115 Ark. 524); or that it does not take away or impair any right of the defendant (*Pekin Cooperage Company* v. *Duty*, 140 Ark. 135); or that the question involved was merely one of procedure and that the statute did not impair any constitutional rights (*Power Manufacturing Company* v. *Saunders*, 169 Ark. 748).

We think the question involved has now been definitely settled by the decisions of this court.

In the case of *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557, the question was not directly involved, but the court, in passing on the question there at issue, said (p. 571):

> "The question is not presented of a distinct ruling by a State court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the Legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

The recent case of *Kentucky Company* v. *Paramount Exchange*, 262 U. S. 544, involved a statute similar in principle and the decision, we contend, is conclusive of this case. In that case a statute of Wisconsin provided for an adversary examination of a party or his officer, agent or employee, etc. In the case of a foreign corporation party the statute provided that the court "may also, on motion and such terms as may be just, fix a time and place in this State for such examination of any of said persons." The statute applicable to suitors other than foreign corporations provided that where the party against whom the examination was sought was a resident of the State, the examination could be had only in the county of his residence, and where the party was a nonresident, the examination could be had in the State only if he could be personally served therein.

Compare this with the statutes of Arkansas under discussion. If the defendant is a resident of the State or a domestic corporation, suit can only be brought in the county where service can be had, or the corporation has a place of business, or if the defendant is a nonresident, suit can only be brought in a county where he can be served, but a foreign corporation can be sued in any county of the State selected by the plaintiff, regardless of other considerations.

In Wisconsin an exception was made as to foreign corporations (very much like the exception made by section 1829, Crawford & Moses' Digest), whereby examinations within the State might be ordered and compelled against them regardless of their nonresidence and of any inability to obtain service on them in the State.

The Supreme Court of Wisconsin undertook to justify this difference in legislative treatment and the order for examination on the ground "that they amounted to no more than a reasonable exercise of the authority of the State over a nonresident corporation coming voluntarily into the State to seek a remedy in her courts against a resi-

dent defendant." In other words, the court seemed to follow the doctrine of the Supreme Court of Arkansas, that the statutes merely affect a method of procedure, and that differences in methods of procedure are not in contravention of the Constitution. This court took a different view, and in passing on the question said:

> "That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight with indifference. It was a 'person' within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pacific R. R. Co.*, 118 U. S. 394, 396; *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Smyth* v. *Ames*, 169 U. S. 466, 522; *Atchinson, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56. The latter clause declares that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' meaning, of course, the protection of laws applying equally to all in the same situation. The words 'within its jurisdiction' are comprehensive, but we have no need for attempting a full definition of them here. It is easy enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. See *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Blake* v. *McClung*, 172 U. S. 239. And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that State than an individual would have been in the same circumstances; for, as was held in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 154, a State has no more power

to deny to corporations the equal protection of the law than it has to individual citizens.

"No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin—a requirement which, under the statute, could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

"We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws."

By analogy, there could be no reason for permitting a corporate resident of Ohio, with its principal place of business in Arkansas County, to be sued in any other county of the State, that would not apply to a domestic corpora-

tion, or an individual resident of Arkansas County, in a like case.

The only other State of which we have knowledge, in which the exact question has arisen, is the State of Missouri. There the statutes provide that suits for libel against corporations shall be brought in the county in which the defendant is located or in the county in which the plaintiff resides. The statute covering the question of venue in libel and other suits against individuals provides that suits may be brought in the county where the defendant resides or where the plaintiff resides and the defendant may be found.

When the statutes were first before the Supreme Court of Missouri the court, by a divided opinion, sustained their validity. Subsequently, however, the court gave the question further consideration, and in the case of *McClung* v. *Pulitzer Publishing Company*, 279 Mo. 370, 214 S. W. 193, overruled former opinions and squarely held that the statutes violated the equal protection clause of the Federal Constitution. The court used the following language (214 S. W., p. 196):

> "So, then, we conclude that since the decision in *Houston* v. *Pulitzer Publishing Co.*, 249 Mo. 332, 155 S. W. 1068, decided April 8, 1913, this court has been of the opinion that the Legislature has not the authority under the State and Federal Constitutions to provide that the venue in libel suits shall be that the individual charged with libel may only be sued in the county where he resides, or where the plaintiff resides if the individual is there found, but that in the case of a corporation charged with libel the corporate defendant may be sued in a county in this State where neither the action accrued nor the corporation has its domicile or agent for the transaction of business, and that the Legislature may not provide that a citizen of the State, who is plaintiff in a libel suit, can sue a

corporate defendant charged with libel in the county where the citizen resides, while a citizen, as plaintiff, who charges an individual defendant with committing a libel, cannot sue the defendant in the county in which the plaintiff resides, unless the individual defendant shall be found in the county where the plaintiff resides." * * * "The Legislature of the State has the power to make reasonable classification of people and of corporations in determining the venue of actions, but it has not the power to make an arbitrary or unreasonable classification. The statute in question is not a venue statute, governing the venue of all libel suits. It is a statute governing the venue of libel suits against corporations. It is not even a statute governing venue of libel suits against newspaper corporations. No good reason has been given why corporate libelers are any different from individual libelers. No reason has been given why a corporate defendant publishing a daily newspaper in the city of St. Louis with a large circulation should be subject to suit in Cole County, while an individual who publishes a paper with a large circulation in Kansas City is not subject to suit in Cole County. We believe none can be given. We believe the classification of individuals and corporations unreasonable, and not based upon 'any difference which bears a just and proper relation to the attempted classification.' No doubt more could be said for the reasonableness of a statute which provided that in all libel suits against individuals and corporations alike the action might be brought in the county where the plaintiff resides if there is publication of the libel in that county. But such is not the statute under consideration. (pp. 198, 199)." * * *

"Would not the court without a moment's hesitation declare unconditional a statute which provided

construction only of statutes is concerned, but they are matters for the court to consider when the question involved is one of violation of the Federal Constitution. The harshness and inconvenience recognized by the Supreme Court of Arkansas in the above decision and which is imposed on foreign corporations and not on domestic corporations or individuals is a denial of the equal protection of the laws such as the Constitution was designed to prohibit.

The Supreme Court of Arkansas lays much stress upon the fact that the statutes of Arkansas, as it has construed them, do not confer a local or county residence upon foreign corporations (*American Hardwood Lumber Company* v. *Ellis Company*, 115 Ark. 524; *Pekin Cooperage Company* v. *Duty*, 140 Ark. 135).

Section 1826, Crawford & Moses' Digest, authorizing foreign corporations to do business in the State, provides that a foreign corporation "shall also designate its general office or place of business in this State." The motion to dismiss in this case, the facts of which must be accepted as true, states that the plaintiff in error had designated its general office or place of business in the State of Arkansas as Stuttgart, Arkansas County; that its business in Arkansas is located and conducted in Arkansas County, and it does not maintain or conduct an office or business in any other county in the State.

It is conceded that, under similar circumstances, a local or county residence in Arkansas County would be conferred upon a domestic corporation. We think it clear that the Supreme Court of the State erred in holding that section 1826 did not confer such a local or county residence, but assuming, as we must, that it was correct in so holding, then the refusal to confer a local or county residence upon the plaintiff in error under the circumstances, while conferring such a local or county residence upon domestic corporations, is as much a discrimination against the plaintiff

in error and is as much an imposition of different regulations, limitations and liabilities upon it from those imposed upon domestic corporations, and is as much a denial of the equal protection of the laws, as if such a local or county residence had been conferred and the Legislature or court had made the same discriminations in statutes affecting venue. In other words, the discrimination exists, and it is immaterial whether it was brought about by failure to confer a local or county residence, or otherwise.

It will no doubt be contended that plaintiff in error is estopped in this case from attacking the constitutionality of the Arkansas statute, either on the ground that it impairs the obligations of a contract or that it denies to it the equal protection of the laws, on the theory that when it entered the State it did so with knowledge of the statutes as construed by the courts of the State and accepted the conditions imposed, one of which, it will, of course, be contended, was that it could be sued on a transitory action in any county in the State. Whatever the law on this question may have been in former times, it has now been definitely settled by this court that a State may not impose unconstitutional conditions upon a corporation as a condition precedent to entering the State. The State may grant or refuse permission to enter, or it may grant permission upon conditions which do not contravene the Constitution, but it cannot impose a condition the object and effect of which is to nullify the Constitution of the United States. In other words, a condition imposed by the State or an agreement made by the entering corporation that said corporation will waive or agree to a nullification of the equal protection clause of the Constitution is void.

This doctrine was definitely announced in the case of *Terral* v. *Burke Construction Co.*, 257 U. S. 529, and cases therein cited, but the question has been more recently considered and discussed at length by this court in the case of

Frost & Frost Trucking Company v. *Railroad Commission of the State of California* opinion delivered June 7, 1926, 271, U. S. 583, where the conclusion reached by the court is stated as follows:

> "It would be a palpable incongruity to strike down an act of State legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

This principle was approved and followed in the recent case of *Hanover Fire Insurance Company* v. *Carr*, decided November 23rd, 1926, 71 U. S. Supreme Court Law Ed. 224.

Respectfully submitted,

GEO. C. LEWIS,
GEO. B. PUGH,
THOS. S. BUZBEE,
Attorneys for Plaintiff in Error.
Little Rock, Ark., Dec., 1926.

APPENDIX.

The sections of the Constitution and statutes of Arkansas pertinent to a consideration of this case are as follows:

Article XII, section II, of the Constitution, which is as follows:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

The following sections of Crawford & Moses' Digest of the Statutes of Arkansas:

"1152. On Corporate Agent at Branch Office. Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporations so keeps or maintains such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said

service of summons or other process of law is had upon said agent, servant or employee of said corporations.

"1171. Against Corporations. An action, other than those in sections 1164, 1165, against a corporation created by the laws of this State may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides; but if such corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of such branch or agency.

"1176. Other Actions. Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned.

"1826. Authority to Do Business. Every company or corporation incorporated under the laws of any other State, Territory or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served.

"1827. Filing Resolution of Board of Directors. Before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall

be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office.

"1828. Rights and Liabilities—Exemptions. Such corporation shall be entiled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State; provided, that the provisions of this act requiring copy of original articles of incorporation or charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad companies which have heretofore built a line of railroad into or through this State; provided, further, that the provisions of this act are not intended and shall not apply to 'drummers' or traveling salesmen soliciting business in this State for foreign corporations which are entirely nonresidents.

"Section 1829. Service of Summons. Service of summons and other process upon the agent designated under the provisions of section 1826 at any place in this State shall be sufficient service to give jurisdiction over such corporation to any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending or not.

"Section 4161. "*Witnesses not compelled to attend where.* A witness shall not be obliged to attend for examination on the trial of a civil action, except in the county of his residence or in adjoining county, nor to attend to give his deposition out of the county where he resides, or where he may be when the supoena is served on him, requiring his attendance within three days. Civil Code, Sec. 586."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. [redacted]258

POWER MANUFACTURING COMPANY, *Plaintiff in Error,*

v.

HARVEY SAUNDERS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

GEO. C. LEWIS,
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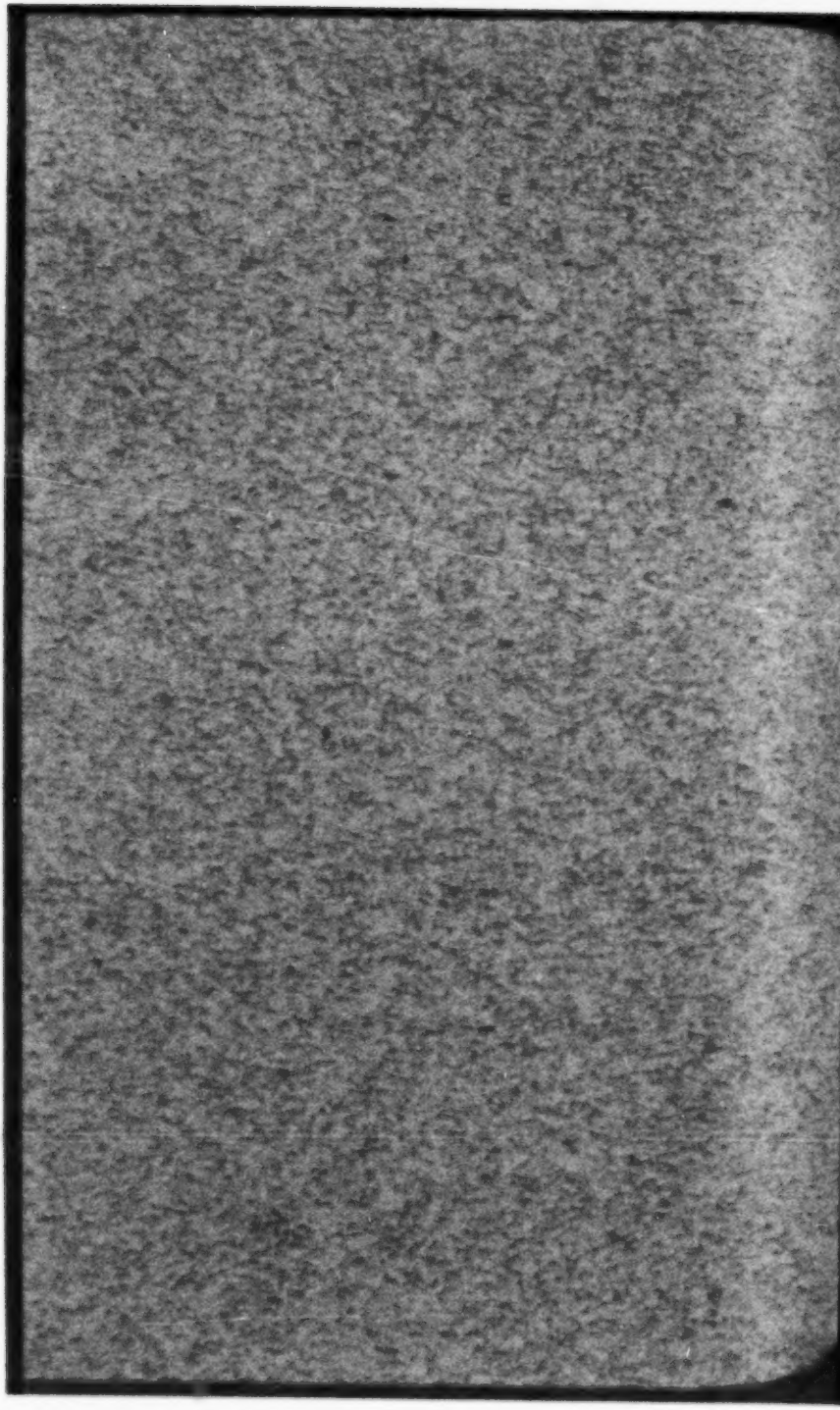

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 851.

POWER MANUFACTURING COMPANY ..... *Plaintiff in Error,*

v.

HARVEY SAUNDERS ..... *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

It will probably be necessary to submit this case without oral argument. For that reason we desire to reply to some questions raised by the brief for defendant in error.

ARGUMENT OF PLAINTIFF IN ERROR THAT THE ARKANSAS STATUTE IS NOT REPUGNANT TO SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES.

Defendant in error argues (page 8 of brief) that if plaintiff in error had been organized under the laws of Arkansas, suit would not necessarily have been brought in Arkansas County, but might have been brought in any county in which the plaintiff in error was situated, or had its principal office or place of business, or in which its chief officer resided, or in which it had a branch office or place of business. There are two answers to this statement: first, the motion to dismiss, filed by plaintiff in error (Tr. p. 4), the facts stated in which must be accepted as true, recites that the plaintiff in error "does not maintain or conduct an office or business in any other county in this State," and, second, that the venue in the suit against plaintiff in error, as a foreign corporation, was not limited to any of the counties named but was extended to all counties in the State, regardless of whether plaintiff in error was located therein, or had a branch office or place of business therein.

It is argued that under section 4161 of Crawford & Moses' Digest, plaintiff in error could have obtained an order of court for the attendance of its witnesses. This section provides that the court may "*at its discretion*" order the personal attendance of witnesses under some circumstances. The most that can be said of this statute is that, if plaintiff in error had been able to make a proper showing to the court, the court had authority to make an order for the attendance of witnesses. It is conceded that the presence of witnesses could not have been obtained as a matter of right as could have been done if the suit had been brought in Arkansas County.

It is argued that the distance between Stuttgart, the county seat of Arkansas County, and Benton, the county seat of Saline County, was not great and that all witnesses who knew anything about the case were present at the trial. These facts are not shown by the record. If the court is to indulge in presumptions of this character, there are many other presumptions which might be indulged in, such as the fact that there are counties in Arkansas where a corporation defendant can obtain a fair and impartial trial, and other counties where it is only necessary to state that the defendant is a corporation, especially a foreign corporation, and the juries will make appropriations for the benefit of plaintiffs regardless of law or facts. Certain it is that the defendant in error, plaintiff below, conceived it to be to his advantage, and to the disadvantage of the plaintiff in error, defendant below, to bring the suit in Saline County, else he would have brought it in Arkansas County which was more convenient to all parties on both sides.

The vice of the statute under consideration is that it permits the plaintiff in suits against foreign corporations to choose his county without let or hindrance, a privilege which the plaintiff does not have in suits against individuals and domestic corporations.

Further, the test in questions of this character is not limited to what has been done under the statute, but what may be done under its authority.

Minnesota v. *Barber*, 136 U. S. 313, 326.

St. L. Sw. Ry. Co. v. *State of Arkansas*, 235 U. S. 350, 362.

Wagner et al. v. *City of Covington*, 251 U. S. 95, 102.

ARGUMENT OF DEFENDANT IN ERROR THAT STATUTE ANTEDATES THE TIME WHEN PLAINTIFF IN ERROR ENTERED THE STATE TO DO BUSINESS.

It is argued that plaintiff in error, in compliance with section 1826, of Crawford & Moses' Digest, designated an agent upon whom process could be served and consented that service upon said agent should be valid service. This case does not involve a question of service but a question of venue. In other words, it is conceded that service upon the agent designated by plaintiff in error was proper, but that section 1829, Crawford & Moses' Digest, is unconstitutional, because it discriminated against plaintiff in error by extending the venue in suits against it to any county in the State. The plaintiff in error did not consent to submit to suit in any county in the State.

It is argued that section 1829 of Crawford & Moses' Digest was in force and effect when plaintiff in error entered the State to do business; that therefore plaintiff in error cannot complain of its provisions. This contention is without merit.

In *Cargill Co.* v. *Minnesota*, 180 U. S. 452, this court said (page 468) that "the acceptance of a license in whatever form will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States."

In *Terral* v. *Burke Construction Co.*, 257 U. S. 529, the corporation came into the State long after the enactment of the Act complained of, yet this court held that the corporation was not bound by the statute.

In *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 544, the court held:

> "A foreign corporation does not, as intimated by the court below, waive any constitutional objection by coming in."

The case of *Conn. Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602, cited by defendant in error (brief, page 12), involved solely the question of due process of law when service was had upon the agent designated by statute. It did not involve in any way the question of discrimination or of a denial of the equal protection of the law.

ARGUMENT OF PLAINTIFF IN ERROR THAT THE ARKANSAS STATUTE DOES NOT CONTRAVENE THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

A number of cases are cited on this point. We think an examination will show that none of them is applicable to the question here at issue. We call attention to them in the order in which they are cited in brief of defendant in error.

Missouri Pacific Railway Company v. *Clarendon Boat Oar Co.*, 257 U. S. 533: This case involved solely the right of the State of Louisiana to provide for suit against foreign corporations upon causes of action arising in the State, without providing for such suit upon transitory actions arising outside the State.

The quotation from the opinion in the brief for defendant in error has sole reference to the question of service.

Robert Mitchell Furniture Co. v. *Selden Breck Construction Co.*, 257 U. S. 213, involved the right to sue a foreign corporation in Ohio upon a contract to be performed in another State. The court held that it should not construe appointment of an agent for service to extend to suits in respect of business transacted by the foreign corporation elsewhere. While a foreign corporation appointing an agent as required by statute may take the risk of the construction that will be put upon the statute and the scope of the agency by the State court, as stated in that part of the opinion quoted by defendant in error, yet there is nothing in the opinion indicating that such foreign corporation waives its right to invoke the equal protection clause of the Constitution.

Old Wayne Life Association v. *McDonough*, 204 U. S. 8, involved a judgment rendered in Pennsylvania against an Indiana corporation upon a contract executed in Indiana upon notice to the Insurance Commissioner. This court held that the statutes of Pennsylvania requiring an insurance company to appoint an agent upon whom service might be had, did not authorize suit against the company upon business transacted in another State.

The quotation from the opinion in the brief of defendant in error refers to assent to "valid terms." Conversely any assent to invalid terms would be void.

Baltimore & Ohio Railroad Co. v. *Harris*, 12 *Wallace*, 65. The court held that the Baltimore & Ohio Railroad Company, incorporated in the State of Maryland but extending its lines into Virginia and the District of Columbia, remained the same corporation and could be sued in the District of Columbia for injuries done in Virginia.

Simon v. *Southern Railway Company*, 236 U. S. 115: The court held that service under statute was not sufficient to give courts in Louisiana jurisdiction over the person of defendant for a cause of action arising in Alabama, and held a judgment based on such service void.

Pennsylvania Fire Insurance Co. v. *Gold Issue Mining Co.*, 243 U. S. 93: The Supreme Court of Missouri held that power of attorney executed by defendant, consenting that service of process upon superintendent should be deemed personal service, was sufficient to give courts of Missouri jurisdiction over actions involving contracts executed in other states. This court held that such construction did not deny defendant due process of law. No question of denial of equal protection of laws was involved. Neither was there involved question of waiver of constitutional rights.

New York, Lake Erie & Western Railroad Company v. *Estill et al.*, 147 U. S. 591: A statute of Missouri provided that suits against all nonresidents could be brought in any county in the State. There was no distinction between nonresident individual defendants and nonresident corporation defendants. The only question involved was whether defendant was to be treated as a resident or nonresident defendant. The question of denial of equal protection of laws by operation of statute was not discussed.

The last two cases, as well as a majority of other cases cited by defendant in error, were decided at a time when this court held that it would not inquire into the reasons of a State for excluding a foreign corporation from doing business within its borders, and prior to the decision in *Terral* v. *Burke Construction Company*, 257 U. S. 529, overruling the cases of *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535 and *Security Mutual Life Insurance Company* v. *Prewitt*, 202 U. S. 246.

AUTHORITIES CITED BY DEFENDANT IN ERROR UNDER ARGUMENT THAT FOURTEENTH AMENDMENT IS NOT CONCERNED WITH FORUMS NOR FORMS OF PROCEDURE.

Defendant in error cites the opinion in *Missouri Ex Rel.* v. *North*, 271 U. S. 40.

That opinion held as follows (p. 43):

> "A statute which places all physicians in a single class, and prescribes a uniform standard of professional attainment and conduct, as a condition of the practice of their profession, and a reasonable procedure applicable to them as a class to insure conformity to that standard, does not deny the equal protection of the laws within the meaning of the Fourteenth Amendment."

Conversely, a statute like the Arkansas statute, which does not prescribe a uniform standard but discriminates against one class of persons (and a foreign corporation is a person) in favor of another class (individuals and domestic corporations) is a denial of the equal protection of the laws.

Cincinnati St. Ry. Co. v. *Snell*, 193 U. S. 30: Involves statute of Ohio authorizing change of venue where one of the parties is a corporation having more than fifty stockholders and the opposite party makes affidavit, sustained by the affidavits of five credible persons, that he cannot obtain a fair and impartial trial. This statute was undoubtedly based upon the theory that a corporation having more than fifty stockholders might exercise an undue influence on the juries in the county.

CONCLUSION.

Other points raised in the brief of defendant in error are fully answered in our original brief. But we desire again to call attention to the case of *Hanover Fire Ins. Co.* v. *Carr*, 71 Law Ed. 224. This case is cited in our original brief and is cited by defendant in error as supporting his contention that the State of Arkansas had the power to exclude plaintiff in error from doing business therein. The

case does not support that contention, but holds directly to the contrary. The opinion reads in part as follows (p. 227):

> "But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated in respect to the breach of the commerce clause of the Constitution by the cases of *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 203, 59 L. ed., 193, 197, 35 Sup. Ct. Rep. 57, and *Looney* v. *Crane Co.*, 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85. It is illustrated in cases in which a provision of a State law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the State courts to the Federal courts has been held void (*Terral* v. *Burke Constr. Co.*, 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 186, 42 Sup. Ct. Rep. 188); in cases in which the State has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of the corporation in the State but also on its property without the State, in violation of the due process clause of the 14th Amendment (*Western U. Telg. Co.* v. *Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 67 L. ed. 297, 43 Sup. Ct. Rep. 125); and finally, in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws."

Further (p. 231):

> "One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits is contractual and that, by coming into the State and engaging in business on the conditions imposed, it waives all constitutional restrictions and can not object to a condition or law regulating its obligations, even though, as a statute operating *in invitum*, it may be in

conflict with constitutional limitations. This argument cannot prevail, in view of the decisions of this court in well-considered cases. *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365; *Western U. Telg. Co.* v. *Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Terral* v. *Burke Constr. Co.*, 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 486, 42 Sup. Ct. Rep. 188; *Fidelity & D. Co.* v. *Tafoya*, 270 U. S. 426, 70 L. ed. (Adv. 379), 46 Sup. Ct. Rep. 331; *Frost* v. *Railroad Commission*, June 7, 1926 (_____ U. S. _____, 70 L. ed. (Adv. 682), 46 Sup. Ct. Rep. 605)."

Under this decision, if the statute of Arkansas which authorizes suits to be brought against plaintiff in error in any or all counties of the State, while such suits can only be brought against individuals, or domestic corporations, in the counties in which they can be found, or served with process, is a denial of the equal protection of the laws, it is immaterial that such statute was in effect when plaintiff in error entered the State, or even that plaintiff in error might by implication have been held to assent thereto.

Respectfully submitted,

Geo. C. Lewis,

Geo. B. Pugh,

Thos. S. Buzbee,

Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted]258

POWER MANUFACTURING COMPANY, *Plaintiff in Error,*

v.

HARVEY SAUNDERS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM R. DONHAM,
Attorney for Defendant in Error.

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OCTOBER TERM, 1925.

No. 851.

POWER MANUFACTURING COMPANY ..... *Plaintiff in Error,*

v.

HARVEY SAUNDERS ..... *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error, Power Manufacturing Company, is a corporation organized under the laws of the State of Ohio, and authorized to do business in the State of Arkansas. The defendant in error, Harvey Saunders, a citizen and resident of Ohio, filed suit against said company in the circuit court of Saline County, Arkansas, to recover damages for personal injuries received while he was in the employ of said company at Stuttgart, Arkansas County, Arkansas.

Plaintiff in error filed a motion to dismiss said suit on the ground that section 1829 of Crawford & Moses' Digest, giving jurisdiction to any of the courts of the State over a foreign corporation, is unconstitutional.

It was contended in the trial court that said section is in violation of the 14th Amendment to the Constitution of the United States, prohibiting a State from depriving any person within the State of his or her property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

It was also contended in the trial court that said section violated certain sections of the Constitution of the State of Arkansas.

Said motion to dismiss was overruled. Upon a trial of the issues, judgment was rendered in favor of the defendant in error. Upon appeal to the Supreme Court of the State, said judgment was affirmed. *Power Manufacturing Company* v. *Saunders*, 169 Arkansas 478.

In the Supreme Court it was contended by plaintiff in error, for the first time, that said section was in violation of section 10, Article 1, of the Constitution of the United States. By reference to the motion to dismiss it will be seen that no such contention was made in the trial court.

ARGUMENT AND BRIEF.

THE ARKANSAS STATUTE IS NOT REPUGNANT TO SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES.

In order that it may do business in Arkansas, a foreign corporation is required to name an agent upon whom process may be served. Section 1826, Crawford & Moses' Digest.

Before authority is granted a foreign corporation to do business in the State, it must file with the Secretary of State a resolution, adopted by its board of directors, consenting that service of process upon any agent of such company in the State, or upon the Secretary of State, in any action brought or pending in the State, shall be valid service upon said company. Section 1827 Crawford & Moses' Digest.

Service of summons and other process upon the designated agent of a foreign corporation is, according to the statute, sufficient to give jurisdiction over such corporation to any of the courts of the State, whether the service was had upon said agent within the county where the suit is brought or is pending or not. Section 1829 Crawford & Moses' Digest.

Actions against a domestic corporation may be brought in any county in which it is situated or has its principal office or place of business, or in which its chief officer resides, or in which it has a branch office, or place of business. Sections 1152 and 1171 Crawford & Moses' Digest.

Actions against private individuals may be brought in any county in which the defendant, or any one of several defendants, resides, or is summoned. Section 1176, Crawford & Moses' Digest.

Plaintiff in error contends that it entered the State of Arkansas under the provisions of article 12, section 11 of the Constitution of Arkansas, which provides, as to foreign corporations, that "as to any contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State." It is contended that section 1829 of Crawford & Moses' Digest violates this section of the Arkansas Con-

stitution, since, by sections 1171 and 1152 of Crawford & Moses' Digest, a domestic corporation can be sued only in a county in which it is situated or has its principal office or place of business, or in which its chief officer resides, or in which it has a branch office or place of business. That section 1829 is not in violation of this section of the Constitution of Arkansas has been decided by the Arkansas Supreme Court in the case at bar and in other cases.

Whether the statute does violate this section of the Arkansas Constitution is a closed question. It has been many times held by this court that the decision of the highest court of a State as to the validity of a statute, under the State Constitution, is conclusive. *Puget Sound Power & Light Company* v. *King County*, 264 U. S. 22 (68 L. Ed. 541); *Terrace* v. *Thompson*, 273 U. S. 197 (68 L. Ed. 255).

It is said that if the Power Manufacturing Company had been organized under the laws of Arkansas this suit necessarily would have been brought in Arkansas County. Not necessarily so; it might have been brought in some other county in which its chief officer resided, or in which it had a branch office or place of business. It is said that if defendant in error had received an injury while employed by an individual or domestic corporation in Arkansas County, he would have been required to bring suit in that county. Not necessarily so; as has already been stated, the corporation might have been sued in any county in which it was situated or had its principal office or place of business, or in which its chief officer resided, or in which it had a branch office or place of business. The private individual might have, under such circumstances, been sued in any county in which he may have resided or in which he was summoned.

It is said by plaintiff in error that because the defendant was a corporation organized under the laws of another State, "defendant in error was allowed to pick any one of 75 counties, and did select a county remote from the scene of the alleged accident, where the court did not have jurisdiction of the witnesses and where, for some reason, possibly the influence of his friends or his counsel or political conditions, he thought his chances for obtaining a verdict were better than they were in Arkansas county." It is further said that because of section 4161 of Crawford & Moses' Digest, which provides that a witness shall not be obliged to attend the trial of a civil action except in the county of

his residence or an adjoining county, "plaintiff in error was required to go to trial without the presence of witnesses, except such as agreed voluntarily to attend."

In reply to these statements we desire to say that the distance between Stuttgart, the county seat of Arkansas County, and Benton, the county seat of Saline County, where the case was tried, is 60 miles by direct line, and there is a good highway between. While the distance between the two county seats is slightly greater than 60 miles by the highway, it is not more than 2½ hours drive from the one place to the other. Plaintiff in error was not required to go to trial without its witnesses. Counsel knows that all witnesses that knew anything about the case, were present at the trial. Plaintiff in error was entitled to compulsory process to obtain the presence of witnesses. It might have taken the deposition of any witness. Section 4161 of Crawford & Moses' Digest is not the only section of the statutes of Arkansas relative to the attendance of witnesses, section 4208 being as follows:

> "*When personal attendance compelled.* Where it is made to appear, by the affidavit of the party and the written statement of his attorney, that the testimony of a witness is important, and that the just and proper effect of his testimony cannot, in a reasonable degree, be obtained without an oral examination before the jury, the court may, at its discretion, order the personal attendance of the witness to be compelled, although such witness may otherwise be exempt from personal attendance by law."

If there was any witness whose presence at the trial plaintiff in error desired, and who refused to attend, why did it not take advantage of this statute? The court would have granted compulsory process for any material witness upon application. Since plaintiff in error did not ask the court for an order requiring the attendance of any witness, it will be assumed that there was no witness whose presence plaintiff in error desired, except those who were present.

It is contended by plaintiff in error that section 1829 of the Digest as enforced by the courts of Arkansas imposes different regulations and greater limitations and liabilities upon corporations organized under the laws of other States than are imposed upon corporations organized under the laws of Arkansas, and therefore that this section is in

violation of article 12, section 11, of the Constitution of Arkansas. The Arkansas Supreme Court has decided contrary to this contention, and its decision is conclusive. *Puget Sound Power & Light Company* v. *King County, supra; Terrace* v. *Thompson, supra.*

It is claimed not only that this section of the statute contravenes the Arkansas Constitution but, by reason of such fact, that it contravenes the contract clause, section 10, article 1, of the Federal Constitution. Since this court is bound by the construction placed upon the statute by the Arkansas Supreme Court, and since that court has held that the statute does not contravene the Arkansas Constitution, it seems that it must be held by this court that it does not contravene the contract clause of the Federal Constitution.

Counsel for plaintiff in error urge that the statute discriminates against foreign corporations, but counsel fail to observe the language of our Constitution, wherein it declares that foreign corporations shall be subject to the same regulations, limitations and liabilities as like corporations of this state, *only as to contracts made or business done.*

The Arkansas Supreme Court has held that the enactment of a law prescribing regulations for instituting suits is not inhibited by our Constitution, since the institution of a suit is neither the making of a contract nor the doing of business. *Alley* v. *Bowen-Merrill Company*, 76 Ark. 4; *State ex rel v. Earle W. Hodges*, 114 Ark. 161.

STATUTE ANTEDATES THE TIME WHEN PLAINTIFF IN ERROR ENTERED THE STATE TO DO BUSINESS.

If article 12, section 11, of the Constitution of Arkansas, which was in force at the time plaintiff in error entered the State to do business, constitutes a contract between plaintiff in error and the State of Arkansas, then it is the contention of defendant in error that this contract is not impaired by section 1829 of Crawford & Moses' Digest, within the meaning of the contract clause of the Federal Constitution.

Section 1829 of Crawford & Moses' Digest was in force and effect when plaintiff in error entered the state to do business, likewise sections 1826 and 1827. Plaintiff in

error complied with the provisions of these statutes. A resolution was passed by its board of directors consenting that service of process upon any agent of the company within the State, in any action brought or pending in the State, should be valid service. It designated an agent in compliance with section 1826 of the statute. If the section of the Arkansas Constitution referred to constitutes a contract between plaintiff in error and the State, it certainly did not become such until the plaintiff in error entered the State to do business. It is the settled doctrine of this court that the contract clause of the Federal Constitution applies only to legislation subsequent in time to the contract alleged to have been impaired. The obligations of a contract cannot be impaired, within the meaning of the United States Constitution, article 1, section 10, by a statute in force when the contract was made. *Cross Lake Shooting and Fishing Club* v. *Louisiana*, 224 U. S. 632, 639, 56 L. Ed. 924; *C. B. Munday* v. *Wisconsin Trust Company*, 252 U. S. 499, 64 L. Ed. 684; *Lehigh Water Company* v. *Easton*, 121 U. S. 388, 30 L. Ed. 1059; *Pinney* v. *Nelson*, 183 U. S. 144, 46 L. Ed. 125; *Chicago & Alton Railroad Company* v. *William J. McWhirt*, 243 U. S. 422, 61 L. Ed. 826; *Bacon et al* v. *State of Texas*, 163 U. S. 207, 41 L. Ed. 132.

It will be seen, on referring to the case cited in the brief of plaintiff in error, that the statutes condemned as contravening the contract clause of the Federal Constitution were all passed subsequent to the time when the corporation entered the State to do business, that is, subsequent to the time when the contract was entered into between the State and the foreign corporation, by which such corporation was to be subjected to all the liabilities, etc., of a domestic one of like character. For instance, in the case of *American Smelting Company* v. *Colorado*, 204 U. S. 103, 51 L. Ed. 393, the statute in question was passed some three years after the smelting company had entered the State of Colorado to do business. This was a tax case, and this court held that the statute, passed subsequent to the time the corporation entered the State to do business, impaired the obligations of the corporation's contract which it had with the State at the time it entered the State to do business.

Since section 1829 Crawford & Moses' Digest was in force and effect at the time plaintiff in error entered the State of Arkansas to do business, and since, by a resolution of its board of directors, it designated an agent, and agreed that service upon such agent should be valid service

in any action brought or pending in the State, it is clear that the statute in question does not impair the obligation of any contract within the meaning of the contract clause of the Federal Constitution.

In the case of *Conn. Mutual Life Insurance Company* v. *Spartley*, 172 U. S. 602, 43 L. Ed. 569, in passing on a statute governing the service of process on foreign corporations, this court said:

> "When the Legislature of Tennessee, therefore, permitted the company to do business within its State, on appointing an agent therein upon whom process might be served, and when, in pursuance of such provisions, the company entered the State and appointed an agent, no contract was thereby created which would prevent the State from thereafter passing another statute in regard to service of process, and making such statute applicable to a company already doing business in the State. In other words, no contract was created by the fact that the company availed itself of the permission to do business within the State under the provisions of the Act of 1875."

THE ARKANSAS STATUTE DOES NOT CONTRAVENE THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

In the case of *Missouri-Pacific Railway Company* v. *Clarendon Boat Oar Company*, 257 U. S. 533, 66 L. Ed., 354, Chief Justice Taft, speaking for the court, said:

> "Provision for making foreign corporations subject to service in the State is a matter of legislative discretion."

In the case of *Robert Mitchell Furniture Company* v. *Selden Breck Construction Company*, 257 U. S. 213, 66 L. Ed. 201, the court said:

> "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. Of course, when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State court."

In the case of *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 22, 51 L. Ed. 345, speaking of a statute of Pennsylvania requiring an insurance company to appoint an agent upon whom service might be had, the court said:

> "Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact business within its limits without filing the written stipulation specified in its statute. It is equally true that if an insurance corporation of another State transacts business in Pennsylvania without complying with its provisions, it will be deemed to have assented to any valid terms prescribed by the commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that commonwealth and there assert its corporate powers."

In *Baltimore & Ohio Railroad Company* v. *Harris*, 12 Wall. 65, 20 L. Ed. 354, the question was as to the jurisdiction of the Supreme Court of the District of Columbia of a suit against a corporation in Maryland, whose railroad entered the District with the consent of Congress. This court said:

> "It (the corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly."

In the case of *Simon* v. *Southern Railway Company*, 236 U. S. 115, 59 L. Ed. 492, this court said:

> "Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be had; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be had upon an officer designated by law."

In the case of *Pennsylvania Fire Insurance Company* v. *Gold Issue Min. & M. Company*, 243 U. S. 93, 61 L. Ed 610, in passing upon the validity of a statute of the State

of Missouri which required foreign insurance corporations to file with the Insurance Commissioner a power of attorney consenting that service of process upon that official should be deemed personal service, this court said:

> "The insurance company set up that such service was insufficient except in suits upon Missouri contracts, and that if the statute were construed to govern the present case, it encountered the 14th Amendment by denying to the defendant due process of law. The Supreme Court of Missouri held that the statute applied and was consistent with the Constitution of the United States.
>
> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case there would be no doubt of the jurisdiction of the State court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law, even if it took the defendant by surprise, which we have no warrant to assert."

By the above cases it is seen that with reference to a State statute requiring foreign corporations to appoint an agent upon whom service may be had, and the giving of jurisdiction to the courts of the State upon such service, the Supreme Court of the United States has held that the decisions of the court of last resort of the State are controlling. In the case last above cited it was held that, by appointing the agent for service required by the statute, the foreign corporation defendant, consented to the jurisdiction of the court, and that to allow it to question the jurisdiction would permit it to set up its own wrong as a defense. It had executed the document required by the State statute designating an agent for service, and this court said:

> "When a power actually is conferred by a document, the party executing it takes the risk of the inter-

pretation that may be put upon it by the courts. The execution was the defendant's voluntary act."

Ordinarily the statutory consent of a foreign corporation to be sued which arises because of compliance with a statute requiring it to designate an agent, does not extend to causes of action arising in other states. *Simon* v. *Southern Railway Company, supra.* But, as in the case of *Pennsylvania Fire Insurance Company* v. *Gold Issue Min. & M. Company, supra* where the court of last resort of a State has held that the effect of such a statute is to give jurisdiction to the courts of the State of causes of action arising in other States, the rule is otherwise.

Since the Supreme Court of Arkansas has held that service of process upon the designated agent of a foreign corporation is sufficient to give jurisdiction to any of the courts of the State, regardless of the fact that the corporation may have its place of business in a county other than that in which the suit is brought, we are confident that such will be the holding of this court.

In the case of *New York, Lake Erie and Western Railroad Company* v. *Wallace Estill et al.*, 147 U. S. 391, 37 L. Ed. 292, this court held that a statute of the State of Missouri authorizing the maintenance of suits against foreign corporations in any county of the State is a valid statute. In this case it was contended by plaintiff in error that it could only be sued in the city of St. Louis, since that was the only place in which it maintained an office or had a place of business, or where any of its officers, agents or employees resided. In upholding the validity of this statute, this court said:

> "We are of the opinion that under the statutes of Missouri the circuit court of Saline County had jurisdiction of the present suits, although the agent and business office of the defendant were in St. Louis, and not in Saline County; that the service in St. Louis of the summons issued by the circuit court of Saline County was valid; and that the defendant was within the provisions of the Missouri statute which made nonresidents suable in any county of the State.
>
> "The principle applicable under such circumstances is that, if the corporation does business in the State, it will be presumed to have assented to the statute, and will be bound accordingly.
>
> "This court will adopt the construction placed upon the statutes of Missouri by the courts of that State."

FOURTEENTH AMENDMENT IS NOT CONCERNED WITH FORUMS NOR FORMS OF PROCEDURE.

In a recent case the Supreme Court of Missouri held that, in proceedings for the revocation of a physician's license, the physician was entitled to take testimony on deposition, as provided by the statute, but not to subpoena witnesses to appear before the board. The physician whose license was revoked assigned as error this holding of the court, contending that such was a denial of due process of law and of the equal protection of the laws under the 14th Amendment.

In passing upon this assignment of error the Supreme Court of the United States held:

> "It has been so often pointed out in the opinions of this court that the 14th Amendment is concerned with the substance and not with the forms of procedure, as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a State any particular form or method of State procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." *State* v. *Emmett P. North*, (April 12, 1926), 70 L. Ed. 406, U. S. Supreme Court Advance Opinions, May 1, 1926. Also see cases cited in the opinion.

In the case of *Cincinnati Street Railway Company* v. *Snell*, 193 U. S. 30, 48 L. Ed. 604, this court, in holding that it is fundamental rights which the 14th Amendment safeguards and not the mere forum which a State may deem proper to designate for the enforcement and protection of such rights, said:

> "The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the 14th Amendment, only because the State has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the

same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered. But it is fundamental rights which the 14th Amendment safeguards, and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are thus protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.

"It follows that the mere direction of the State law that a cause, under given circumstances, shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guaranty of the equal protection of the laws where in both the forums equality of law governs an equality of administration prevails."

The above statement of law is borne out by the reasoning of the court in the case of *National Surety Company* v. *Architectural Decorating Company*, 266 U. S. 276, 57 L. Ed. 221; also *Bernheimer* v. *Converse*, 206 U. S. 284, 51 L. Ed. 1163.

POWER TO EXCLUDE.

Foreign corporations cannot do business in a State except by the consent of the State. The State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. *Fidelity & Deposit Company of Maryland* v. *Ed. C. Tafoya.* Supreme Court Advance Opinions (Mch. 15, 1926) 70 L. Ed. 379. It has been held by this court, however, that the power to exclude is qualified, in that a State cannot exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. For instance, it has been held that the power of a State to exclude a foreign

corporation cannot be used to prevent it from resorting to a Federal court. *Terrall* v. *Burke Construction Company*, 257 U. S. 529, 66 L. Ed. 352. Nor can the power to exclude be used to tax a foreign corporation upon property that, by established principles, the State has no power to tax. *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 355. Nor can the power to exclude be used so as to interfere with interstate commerce. *Sioux Remedy Company* v. *Cope*, 235 U. S. 197, 59 L. Ed. 193. Nor can the power to exclude be used to regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the State making the attempt. *New York, L. E. and Western Railroad Company* v. *Pennsylvania*, 153 U. S. 628, 38 L. Ed. 846.

However, so far as we are aware, it has never been held that the right of a State to exclude a foreign corporation cannot be used to compel such corporation, when it enters the State for the purpose of doing business, to submit to suit in any of the courts of the State, which the State, in its discretion, may see proper to designate.

In the recent case of *Hanover Fire Insurance Company* v. *Carr*, Supreme Court Advance Opinions (December 15, 1926) 71 L. Ed. 224, Chief Justice Taft, speaking for the court, said:

> "In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a *quasi* citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

It will be seen from the above case that the measure of the burden imposed by a State upon a foreign corporation, for the privilege of doing business in the State, is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment.

In the last above case it was further said:

> "The State in dealing with foreign corporations may properly and without discrimination as between them and domestic companies regulate the former by a provision that, for a failure by them to comply with any valid law governing the conduct of their business in the State, the license already granted may be revoked. That is a legitimate condition in the treatment of foreign companies which do not have property and home within the State."

Sections 1826, 1827 and 1829 of Crawford & Moses' Digest prescribe conditions upon which a foreign corporation may be permitted to do business in Arkansas, and it may be said that it was within the discretion of the State to impose such conditions.

In the case of *Wilson* v. *Seligman*, 144 U. S. 41, 36 L. Ed. 338, this court said:

> "It may be admitted that any State may by its laws require, as a condition precedent to the right of a corporation to be organized, or to transact business, within its territory, that it shall appoint an agent there on whom process may be served; or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicil at which, service may be made within the State, and that, upon his failure to make such appointment or designation, the service may be made upon a certain public officer, and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the State. In such cases, the service is held binding because the corporation, or the stockholders, or both, as the case may be, must be taken to have consented that such service within the State shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder."

Speaking of statutory provisions requiring foreign corporations, desiring to engage in business within the State, to file a certificate appointing or designating an agent upon whom service may be had, we find the following in 12 R. C. L. 58:

> "The constitutionality of these various statutes prescribing the mode of service of process on a foreign corporation doing business in a State has been frequently challenged on the ground that they deprive the foreign corporation of its liberty and property without due process of law, as well as deny to it the equal protection of the laws, but they have been invariably sustained as necessary corollaries of the State's general power to admit conditionally or to exclude altogether such corporations from its borders, even when they exact an annual fee for the services of a designated officer as attorney."

CLASSIFICATION.

It seems that the Arkansas statute should be upheld on the ground of reasonable classification. In the case of *St. Mary's Franco-American Petroleum Company* v. *State of West Virginia*, 203 U. S. 183, 51. L. Ed. 144, the validity of a statute providing for service on foreign corporations and nonresident domestic corporations having their places of business and works outside of the State, was brought into question. The statute required such corporations, by power of attorney duly executed, acknowledged and filed in the office of the Auditor for the State of West Virginia, to appoint said Auditor and his successors in office attorney in fact to accept service of process, and by the same instrument to declare its consent that service of any process or notice on said attorney in fact or his acceptance thereof indorsed thereon, shall be equivalent for all purposes to and shall be and constitute due and legal service. In upholding the validity of this statute, Chief Justice Fuller, speaking for the court, said:

> "It is argued that the act of February 22, 1905, is invalid under the 14th Amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But, in view of repeated decisions of this court, the contention is without merit. The State

had the clear right to regulate its own creations, and, *a fortiori*, foreign corporations permitted to transact business within its borders.

"In this instance it put all nonresident domestic corporations, which elected to have their places of business and works outside of the State, and all foreign corporations coming into the State, on the same footing in respect of the service of process, and the law operated on all these alike.

"Such a classification was reasonable, and not open to constitutional objection."

In the case of *Crescent Oil Company* v. *Mississippi*, 257 U. S. 129, 66 L. Ed. 166, this court said.

"Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a State, and where, as here, no contract right is involved, and there is no employment by the Federal government, it is the settled law that a State may impose conditions, in its discretion, upon the right of such corporation to do business within the State, even to the extent of excluding it altogether. *Hern Silver Min. Co.* v. *New York*, 143 U. S. 305, 36 L. Ed. 164; *Baltic Min. Co.* v. *Massachusetts*, 231 U. S. 68, 83, 58 L. Ed. 127, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only."

Citing *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 343, 344, 53 L. Ed. 530, 541, 542; *Baltic Min. Co.* v. *Massachusetts, supra.* And *Ft. Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532, 533, 64 L. Ed. 396, 398; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. Ed. 102; *Williams* v. *Fears*, 179 U. S. 270, 276, 45 L. Ed. 186, 189; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. Ed. 619.

In the case of *Stebbins* v. *Riley*, 268 U. S. 137, 69 L. Ed. 884, this court said:

"The guaranty of the 14th Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of State legislation upon all citizens of a State. • • • In other words, the State may distinguish, select, and classify

objects of legislation, and necessarily this power must have a wide range of discretion."

In the case of *Haavik* v. *Alaska Packers Association*, 263 U. S. 510, 68 L. Ed. 414, an act of the Alaska Legislature, which imposed an annual license tax of $5 upon each nonresident fisherman, was brought into question as contravening the equal protection clause of the Constitution, since the act did not apply to residents. Speaking of this classification, this court said:

> "This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the territory must largely depend." Citing *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87, 63 L. Ed. 138; and *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44, 47, 48, 65 L. Ed. 489, 494, 495.

In the case of *Radice* v. *New York*, 264 U. S. 292, 68 L. Ed. 690, construing the equal protection clause of the 14th Amendment as applicable to the facts of that case, this court said:

> "The mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be actually and palpably unreasonable and arbitrary." Citing *Arkansas Natural Gas Company* v. *Railroad Commission*, 261 U. S. 279, 67 L. Ed. 705.

In the recent case of *Hanover Fire Insurance Company* v. *Carr*, supra, this court said:

> "The State in dealing with foreign corporations may properly and without discrimination as between them and domestic companies regulate the former by a provision that for a failure by them to comply with any valid law governing the conduct of their business in the State the license already granted may be revoked. That is a legitimate condition in the treatment of foreign companies which do not have property and home within the State. It is a police regulation."

PLAINTIFF IN ERROR IS NOT IN POSITION TO INVOKE THE PROTECTION OF THE 14TH AMENDMENT.

The plaintiff in error applied to the State of Arkansas for a license to do business within the State. It filed with the Secretary of State a resolution adopted by its board of directors consenting that service of process upon any agent of the company in the State or upon the Secretary of State, in any action brought or pending in the State, shall be valid service. It designated an agent, as required by section 1826. Section 1829 provides that service of process upon the agent designated under the provisions of section 1826 shall give jurisdiction to any of the courts of the State. After complying with these sections of the statute it was given a license to do business and entered the State for that purpose. It carried on its business in the State and reaped the profits incident thereto.

In the case of *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623, this court said:

> "One cannot in the same proceeding both assail a statute and rely upon it. Nor can one who avails himself of the benefits conferred by a statute deny its validity."

Plaintiff in error has availed itself of the benefits conferred by the statute of Arkansas which it now assails. It is therefore in no position to deny its validity. In the last above case it was held that one was not estopped from seeking relief against the provisions of a statute merely because he applied to the State officials for a certificate of public convenience, but in this case the certificate was never issued. He received no benefit and therefore was not estopped. In dealing with this phase of the case this court said:

> "But in the case at bar Buck does not rely upon any provision of the statute assailed; and he received no benefit under it. He was willing, if permitted to use the highways, to comply with all the laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel."

In the case of *Pierce Oil Corporation* v. *Phoenix Refining Company*, 259 U. S. 125, 66 L. Ed. 855, the oil corporation questioned the validity of a statute of the State of Oklahoma which governed the acceptance and transporta-

tion of crude petroleum through pipe lines in that State and declaring every corporation so engaged a common carrier. It was claimed that this statute violated the 5th and 14th Amendments to the Constitution of the United States. In this case Mr. Justice Clark, speaking for the court, said:

> This Constitution and these laws had been in effect for five years when the Pierce Company, by applying for and obtaining the privilege of conducting its business operations within the State, elected to respect and obey them. * * * When the large discretion which the State had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business, is considered, the contention that this order of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law, must be pronounced futile to the point almost of being frivolous. *By accepting the privilege it voluntarily consented to be bound by the conditions attached to it, and while enjoying the benefits of that privilege it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the State, is unconstitutional.*"

The case of *Kentucky Company* v. *Paramount Exchange*, 262 U. S. 544, cited by plaintiff in error, we believe is not an analogous case. In that case a Kentucky corporation went into a State court in the State of Wisconsin and filed a replevin suit for the purpose of recovering its property. The corporation had not been admitted to do business in the State of Wisconsin on certain conditions such as in the case at bar. When a State grants a foreign corporation a privilege, such as permitting it to come into the State for the purpose of doing business, its classification of such corporation for more onerous duties than are required of domestic corporations, is not, in our judgment, arbitrary.

There is another reason why the plaintiff in error is not in a position to invoke the protection of the 14th Amendment. It cannot invoke the protection of this amendment merely by showing that it is a foreign corporation. It cannot rely on theoretical inequalities, or such as do not affect it, but must show that it personally is affected unfav-

orably by the discrimination of which it complains. Counsel argue that it could not have its witnesses present at the trial except such as were voluntarily present. It does not show that any witness was absent by reason of the fact that the suit was filed in Saline County instead of Arkansas County, and if it had made such showing the fault would have been entirely its own, since it had the right to petition the court for compulsory process for its witnesses, and failed to do so. The fact is that every witness was present who knew anything about the case. The case was one for personal injury alleged to have been caused by the falling of a large iron wheel on the leg of defendant in error. Only two persons saw it, they being fellow-servants. They were both present and testified. It is alleged that the injury occurred because of their negligence in permitting the wheel to fall, and because of a defect in the floor of the warehouse where the injury occurred. We repeat that everybody that seemed to know anything about the case, either as to the negligence of the fellow-servants or as to the defect in the floor, were present and testified as witnesses, and plaintiff in error makes no showing whatever that any witness was absent, and we further repeat that if it had done so it is in no position to take advantage of such a contention, since it did not exhaust its remedies provided under the statutes of Arkansas to obtain presence of its witnesses. In the case of *Roberts & Schaffer Company* v. *Louis L. Emmerson*, Supreme Court Advance Opinions, May 1, 1926, p. 410 (70 L. Ed. 410) this court said:

> "But the plaintiff is not in a position to raise this question. As this court has often held, one who challenges the validity of State taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities, or such as do not affect him, but must show that he is himself affected unfavorably by the discrimination of which he complains." See *Western U. Teleg. Co.* v. *Atty. Gen.*, 125 U. S. 530, 552, 553, 31 L. ed. 790; *Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 60, 61 L. ed. 523, 526; *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63, 63 L. ed. 479; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 121, 65 L. ed. 165.

WHEN POSSIBLE, A STATUTE MUST BE CONSTRUED TO BE CONSTITUTIONAL.

This court has often held that ,when possible, a statute must be construed to be constitutional, and so as to avoid grave doubts as to its constitutionality.

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 68 L. ed. 748; *Linder* v. *United States*, 268 U. S. 5, 69 L. Ed. 819.

CONCLUSIONS.

Summing up the argume[illegible] herein presented we may say:

1. If article 12, section 11, of the Constitution of Arkansas could be said to be a contract between plaintiff in error and the State, this contract is not violated by reason of the fact that plaintiff in error was brought into the court of Saline County instead of Arkansas County. The Arkansas Supreme Court has so decided, and its decision is conclusive.

2. If the section of the Arkansas Constitution referred to could be said to be a contract between the State and the plaintiff in error, it can be held to be such *only as to contracts made and business done*, for such is the plain wording of this section. The enactment of a law prescribing regulations for instituting suits is not inhibited by this section of the Constitution, since the institution of a suit is neither the making of a contract nor the doing of business. It has been so held by the Arkansas Supreme Court.

3. The statutes of Arkansas provide for the compulsory attendance of witnesses, no matter in what county the suit is brought. Plaintiff in error did not avail itself of this provision of the statutes and therefore is in no position to complain. All its witnesses were present at the trial.

4. Section 1829 of Crawford & Moses' Digest was in force and effect at the time plaintiff in error entered the State to do business. The obligation of a contract cannot be impaired within the meaning of the United States Constitution, article 1, section 10, by a statute in force when the contract was made.

5. Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion. With reference to a statute requiring foreign corporations to appoint an agent upon whom service may be had and giving jurisdiction to the courts of the State upon such service, the decisions of the court of last resort of the State are controlling. When a foreign corporation names an agent in accordance with such statutes and enters the State to do business, it takes the risk of the interpretation that may be put upon the statutes by the State courts.

6. The 14th Amendment is not concerned with mere forums nor forms of procedure.

7. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

8. The measure of the burden imposed by a State upon a foreign corporation, for the privilege of doing business in the State, is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment.

9. When a State grants a foreign corporation a privilege, such as permitting it to enter the State for the purpose of doing business, its classification of such corporation for more onerous duties than are required of domestic corporations, is not arbitrary.

10. Plaintiff in error is in no position to invoke the protection of the 14th Amendment because it has availed

itself of the benefits which it has derived from compliance with the very statute which it now assails.

11. Plaintiff in error is in no position to invoke the protection of the 14th Amendment since it has not shown itself to have been unfavorably affected by reason of the fact that the suit was brought in Saline County instead of Arkansas County.

For the reasons given we submit that the judgment of the Arkansas Supreme Court should be affirmed.

WILLIAM R. DONHAM,

Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 258.—October Term, 1926.

Power Manufacturing Company, Plaintiff in Error, *vs.* Harvey Saunders.	In Error to the Supreme Court of the State of Arkansas.

[May 31, 1927.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action to recover for a personal injury sustained by the plaintiff while in the defendant's employ. The plaintiff was a citizen and resident of Ohio, and the defendant was a corporation of that State. Besides its activities in Ohio, the defendant maintained a warehouse at Stuttgart, Arkansas, where it did a local business. The plaintiff received his injury in that warehouse. The defendant had complied with the conditions on which Arkansas permits foreign corporations to do a local business within her limits, and as part of its compliance had named Stuttgart as its place of business in the State and designated an agent residing there on whom process against it might be served. See Crawford & Moses Digest 1921, sec. 1826. It did no business and had no office, officer or agent elsewhere in the State. Stuttgart is in Arkansas County and is its county seat.

The action was brought in Saline County, Arkansas, service of the summons being made on the defendant's designated agent at Stuttgart. The plaintiff obtained a judgment, which the Supreme Court of the State affirmed, 169 Ark. 748; and the defendant brought the case here on writ of error.

The Arkansas statutes require actions of this character, if against a domestic corporation, to be brought in a county where it has a place of business or in which its chief officer resides, and, if against a natural person, in a county where he resides or may be found; but they broadly permit such actions, if against a foreign corporation, to be brought in any county in the State. Crawford & Moses

Digest 1921, secs. 1152, 1171, 1176, 1829; *Jacks* v. *Central Coal and Coke Co.*, 156 Ark. 211.

Another statute (sec. 1174) permits both foreign corporations and persons residing out of the State to be sued in any county in which they have property or debts owing to them. Attachment and garnishment proceedings and some others may be had under it. But it concededly is without application here and may be put aside. The defendant neither had any property nor owned any debts in the county where it was sued.

By a timely motion to dismiss the defendant objected to being sued in Saline County and assailed the validity of the statutes, in so far as they permit a foreign corporation to be sued in a county where it does no business and has no office, officer, or agent, on the ground that they are unreasonably discriminatory and arbitrary, and therefore in conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The court of first instance upheld the validity of the statutes and accordingly overruled the motion; and the Supreme Court approved that ruling.

Thus the statutes were applied as permitting the defendant, a foreign corporation doing business in one county, to be sued in another county, where it did no business and had no office, officer or agent, on a cause of action which arose in the former. Other counties lay between the two, making the distance from the defendant's place of business to the place of suit 75 miles by railroad and a few miles less by public roads. This of course tended to increase materially the burden otherwise incident to presenting a defense.

It is conceded that the statutes neither permit a domestic corporation to be sued in a county in which it does no business and has no office, officer or agent, nor permit a natural person to be sued in a county in which he does not reside and is not found. On the contrary, they confine the admissible venue as to both to counties in which the defendant is present in one of the ways just indicated. But a foreign corporation is differently treated. If it be present in a single county, as by having a place of business there, it is made subject to suit not merely in that county, but in any of the 74 other counties although it be not present in them in any sense.

We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations and individuals, and that the discrimination is not theoretical merely, but real and substantial.

The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, *Truax* v. *Corrigan*, 257 U. S. 312, 333; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56, 59, and extends as well to corporate as to natural persons, *Smyth* v. *Ames*, 169 U. S. 466, 522; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 154; *Santa Clara County* v. *Southern Pacific R. R. Co.*, 118 U. S. 394, 396. It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. *Truax* v. *Corrigan, supra*, p. 337; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis, supra*, 155; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Ft. Smith Light & Power Co.* v. *Board of Improvement*, (May 16, 1927).

No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.

Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statutes mean foreign corporations doing business within the State by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course the restricted venue as to domestic corporations and

individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary.

The state court put its decision on the ground that venue is a question of procedure which the State may determine; and counsel for plaintiff advance the further ground that the defendant impliedly assented to the venue provisions by seeking and obtaining permission to do business within the State, the provisions being then on the statute book. But neither ground can be sustained.

It of course rests with the State to prescribe the venue of actions brought in her courts. But the exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action. Procedural statutes are not excepted, but must fall like others when in conflict with those limitations. This is illustrated in a recent case where a statute of Arizona forbidding the granting of injunctions in certain situations was held to be in conflict with the equal protection clause of the Fourteenth Amendment and invalid notwithstanding a contention that it was merely a procedural provision excluding a particular remedy in equity but leaving remedies at law open. *Truax* v. *Corrigan*, *supra*, pp. 322, 330. Further illustration is found in a still later case where a Wisconsin statute subjecting foreign corporations to a burdensome procedural requirement not laid on other litigants was pronounced invalid under the same constitutional provision. *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation*, 262 U. S. 544. And on turning to state decisions we find direct rulings that venue provisions must conform to the equal protection clause and are invalid where they discriminate arbitrarily against either individuals or corporations. *Grocers' Fruit Growing Union* v. *Kern County Land Co.*, 150 Cal. 466, 474-475; *McClung* v. *Pulitzer Publishing Co.*, 279 Mo. 370.

The case of *Cincinnati Street Ry. Co.* v. *Snell*, 193 U. S. 30, is cited as if venue provisions were there held to be beyond the reach of the equal protection clause. But this is a strained and inadmissible interpretation. That was an action by an individual against a corporation which was begun, conformably to a general statutory requirement, in the county where the defendant had its principal office and was engaged in business. Another statute authorized the court to change the venue in such an action "to the adjacent county most convenient to both parties" if it appeared that the corporation had more than fifty local stockholders, and if it was also shown by the affidavit of the other party, supported by five credible citizens, that he could not have a fair and impartial trial in the county where the suit was begun. A showing was made which brought the case within the statute; and the court changed the venue over the defendant's objection that the statute operated unequally and was invalid in that it permitted the other party but not the corporation to secure the change. The statute doubtless proceeded on the assumption, first, that a corporation with many local stockholders might have such influence in the county that the other party would be at a serious disadvantage, unless provision were made whereby the court, on an adequate showing, might change the place of trial to another county free from such influence and as convenient as might be to both parties, and, secondly, that the corporation was not likely to suffer any prejudice in its home county through having many stockholders there. At all events the difference in the situation of the parties and the relation of that difference to the matter of changing the place of trial were such that it could not be said of such discrimination as was shown in the statute that it was without a reasonable and adequate basis. The opinion affirmatively shows that the defendant was not objecting to the place designated by the court for the trial, but only that the statute did not accord it an equal opportunity to secure a change from the county where the action was begun. When the opinion is examined with the actual situation in mind it has little bearing on the case now before us.

The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped

from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States. The principal cases are cited and reviewed in *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, 507, *et seq.*, and *Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583, 594, *et seq.* To them may be added the case of *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468, where it was held that "the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute . . . that are repugnant to the Constitution of the United States."

We accordingly reach the conclusion that the defendant's objection before stated to the validity of the venue provisions was well taken and should have been sustained under the equal protection clause of the Fourteenth Amendment.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 258.—October Term, 1926.

Power Manufacturing Company, Plaintiff in Error, *vs.* Harvey Saunders.	In Error to the Supreme Court of the State of Arkansas.

[May 31, 1927.]

Mr. Justice Holmes, dissenting.

In order to enter into most of the relations of life people have to give up some of their Constitutional rights. If a man makes a contract he gives up the Constitutional right that previously he had to be free from the hamper that he puts upon himself. Some rights, no doubt, a person is not allowed to renounce, but very many he may. So we must go further than merely to point to the Fourteenth Amendment. I see nothing in it to prevent a foreign corporation agreeing with the State that it will be subject to the general law of torts and will submit to a transitory action wherever it may be sued. That the venue for suits against domestic corporations is limited by statute seems to me not enough to invalidate its assent. Every contract is the acceptance of some inequality—and under our decisions I think it cannot be denied that the plaintiff in error did contract. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96. The jurisdiction of the Court would have been unquestionable if it had not been objected to, and I do not see why consent could not be manifested by contract as well as by silence. While we adhere to the rule that a State may exclude foreign corporations altogether it seems to me a mistake to apply the inequality clause of the Fourteenth Amendment with meticulous nicety. The Amendment has been held not to overthrow ancient practices even when hard to reconcile with justice. I think there are stronger grounds for not reducing the power of the States to attach conditions to a consent

that they have a right to refuse, when there is no attempt to use the conditions to invade forbidden fields.

Apart from the contract of the corporation there seems to me a ground for discrimination that ought to be respected when it has satisfied the State. A statute has to be drawn with reference to what is usual and probable. A foreign corporation merely doing business in the State and having its works elsewhere will be more or less inconvenienced by being sued anywhere away from its headquarters, but the difference to it between one county and another is likely to be less than it will be to a corporation having its headquarters in the State. So I repeat that in my opinion the plaintiff in error cannot complain if the State holds it liable to a transitory action wherever it may be served and sued, as it would have been liable at common law.

Mr. Justice Brandeis concurs in this opinion.